88-346

Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

ANTHONY MINIZZA, *et al.*,
Petitioners,

v.

STONE CONTAINER CORP. CORRUGATED CONTAINER DIV. EAST PLANT, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

In lieu of a wage increase, the collective bargaining agreements at issue in this case provided for two bonus payments. With a minor exception, to be eligible for the first payment, employees had to be active employees on the effective date of the agreement and three months prior thereto; to be eligible for the second payment, employees had to be active employees a year after the effective date of the agreement and six months prior thereto. The court of appeals held that the amount of the bonus payments need not be included in the "regular rate" of compensation in calculating the overtime payments due employees under § 7 of the Fair Labor Standards Act, because the payments are not "compensation for hours of . . . employment" under § 7(e)(2) of the Act. The questions presented are:

(a) Does the "regular rate" of compensation for purposes of calculating overtime payments under the Fair Labor Standards Act include payments to employees as compensation for services rendered, where the amount of compensation does not depend upon the precise number of hours worked or services rendered?

(b) Are lump sum payments, such as the ones in this case, negotiated in lieu of wage increases "compensation for hours of employment", to be included in the "regular rate" of compensation for purposes of calculating overtime payments under the Fair Labor Standards Act? *

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* The appellants in the court of appeals, now respondents in this Court, were Stone Container Corp., Corrugated Container Division, East Plant, Stone Container Corp., Corrugated Container Division, West Plant, Chesapeake Corrugated Co., and Owens-Illinois, Inc. The appellees in the court below, petitioners in this Court, were several hundred individuals; because of their large number, their names appear in Appendix E to this *certiorari* petition.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Anthony Minizza *et al.*, petition this Court to issue a writ of certiorari to the United States Court of Appeals for the Third Circuit to review the decision and judgment in *Minizza v. Stone Container Corp., Corrugated Container Div. East Plant*, 842 F.2d 1456 (3d Cir. No. 87-1348; March 28, 1988).

OPINIONS BELOW

The opinion of the court of appeals is reported at 842 F.2d 1456 and is reprinted in the appendix to this petition at 1a-22a ("Pet. App."). The order of the court of appeal denying rehearing and rehearing *en banc* is unreported and is reprinted at Pet. App. 36a. The opinion after a non-jury trial of the District Court for the East-

ern District of Pennsylvania is reported at 660 F. Supp. 404 and is reprinted at Pet. App. 23a-35a.

JURISDICTION

The court of appeals' order denying rehearing was entered on April 26, 1988. On July 20, 1988, the time for filing a petition for writ of certiorari was extended by Mr. Justice White until August 24, 1988. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent statutory and regulatory provisions are reprinted at Pet. App. 46a-48a.

STATEMENT OF THE CASE

The Underlying Facts

Plaintiffs in this case are several hundred employees who are or were employed by one of the defendant companies (all referred to collectively as "the Employers"), and who are or were represented for purposes of collective bargaining with their employer by United Paperworkers International Union Local 375 ("the Union").[1]

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[1] One of the employer defendants, Stone Container Corporation, negotiated separately with the Union for one of its two plants (Stone Container Corporation West Plant) involved in this lawsuit. Stone Container Corporation East and the other employer defendants negotiated with the Union as part of a multiemployer bargaining unit, the Philadelphia Container Association. The Stone West negotiations took place after the Association bargaining was completed; Stone West was represented in bargaining by the same individuals who had represented Stone East, and the agreements reached in the two sets of negotiations were, for present purposes, identical. While, for simplicity sake, we discuss in the text the Association negotiations only, the course of events, and the resulting agreement, at Stone West were for all relevant purposes factually similar.

Prior to 1984, all labor agreements entered into between the Employers and the Union provided for annual wage increases. In 1984, however, the Employers sought new contracts with no increase in the base hourly wage rates. Pet. App. 25a. The Union, on the other hand, proposed initially a $1.25 per hour wage increase in each year of the contract. R. 90.

In response, the Employers made a proposal novel in the relationship between these parties: Rather than paying employees on an hourly basis throughout the year, the Employers proposed, under the heading "wages", a "one-time lump sum bonus of $250.00 in the second and third years of the contracts, to be paid to employees who worked at least 1,000 hours in the year preceding the bonus eligibility date"; according to that proposal, there would be "no *other* wage or salary adjustments during the life of the agreement." R.94 (emphasis supplied). The reason that the Employers preferred this alternative (and why the practice of providing such lump sum payments has become popular generally) is that such payments, unlike hourly wage increases, do not become part of the wage rate from which bargaining begins at the time of the next negotiations, or of the wage rate used in calculating such benefits as vacation pay, workers' compensation, and contractual (as opposed to statutory) overtime pay. Pet. App. 27a; R. 47-48, 167. As a result, the long term cost to employers of lump sum payments of this kind is substantially less than would be inclusion of an equivalent amount, prorated, in the hourly wage rate.

After the initial bonus proposal there ensued extensive negotiations over the amount, timing, and eligibility requirements for the bonus payments. While the time period for eligibility at some point became expressed in months of active employment rather than in the precise number of hours worked, the requirement of a specified period of service was part of the bonus concept from

beginning to end. Further, as the district court found,[2] the negotiations consistently focussed upon the payments as settling the wage aspect of the agreement:

> Both employer and Union representatives, during the negotiations, discussed the bonuses and recorded such discussions under the subject of wages. Bonuses are also treated under the subject of wages in the contracts themselves, the memoranda of understanding, and the employer negotiation notes. Changes in the bonus amounts during the course of negotiations were made in response to, or in conjunction with, proposals relating to cents-per-hour increases. In discussions between the parties across the table, bonus amounts were translated into cents-per-hour; the employer's negotiating notes show the same calculations made in employer caucuses and minutes. [Pet. App. 26a].

The result of the negotiations (after the rejection on a ratification vote of an earlier proposal, and some changes in the lump sum payment terms) was a Memorandum of Agreement that listed changes not only in "Health and Welfare", "Sickness and Accident Disability Benefits", "Life Insurance, Accidental and Death Benefits", "Pension", and "New Hires" but also in "Wages." The entry under the latter heading was as follows:

> July 1, 1984: $750 bonus to eligible employees;

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[2] The court of appeals did not in terms purport to upset this or any other of the district court's findings as "clearly erroneous" (*Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985)). Pet. App. 6a. The court of appeals did disagree with the district court's characterization of the payments as "compensation for . . . employment" within the meaning of the statute. Pet. App. 10a. While that disagreement may well have been beyond the court of appeals' power under *Anderson v. City of Bessemer* and other cases of this Court, the pertinent point for present purposes is that the court of appeals in no way questioned any of the district court's factual findings as to the actual course of events quoted or relied upon in this section.

> July 1, 1985: $500 bonus to eligible employees and a general increase in base wage rates of $.15 per hour.
>
> July 1, 1986: A general increase in base wage rates of $.50 per hour.
>
> *Eligibility for Bonuses:* For the July 1, 1984 bonuses, the employee must have been an active employee for three months. For the July 1, 1985 bonus, the employee must have been an active employee for six months. If the employee was on the seniority list for the applicable time period prior to the adjustment date but is on sick leave or layoff as of the date, the employee will receive a pro rata bonus when he/she returns to work. [R. 60; *see also* R. 62.]

Thus, "[t]he lump sum bonuses were negotiated in lieu of first and second year wage increases." Pet. App. 26a. While "[t]he lump sum payments were also inducements by the employer to secure the employees' ratification of the contract in the face of minimal wage increases and reductions in medical benefits," this was, according to the trial court's findings, true only in the same sense that "[e]very aspect of a labor agreement is intended to induce ratification and achieve labor peace," Pet. App. 26a-27a. The Memorandum of Agreement was ratified by the employees, and was eventually reflected in the final contract between the parties. R. 45; *see also* R. 75.

Throughout the negotiations, "the implications of the FLSA for the treatment of the lump-sum payments for calculating of overtime. . . . [were] *never* discussed or considered. . . ." (Pet. App. 27a, emphasis added). A few months after the negotiations were completed, however, the Union was advised by its legal counsel that the Fair Labor Standards Act, 29 U.S.C. § 207, requires the inclusion of the negotiated bonuses in calculating the regular rate of pay for purposes of determining the statutory time-and-a-half rate due for hours worked over forty hours in a week.

When the Employers refused to calculate overtime on this basis, the Union contacted the Department of Labor for general guidance regarding the overtime treatment of lump sum bonuses. The Department declined to offer any definitive advice, noting that many different forms of lump sum bonus payments have recently been included in collective bargaining agreements, and that "because the employees involved are collectively represented . . . this is an area in which compliance with the provisions of the Act is best left to the parties to achieve, through litigation or otherwise." R. 36. The Union thereupon instituted the lawsuits that underlie the decision below and this Petition.

Proceedings Below

After trial, the district court concluded that the lump sum payments at issue in this case must be included as part of an employee's "regular rate" in calculating statutory overtime pay:

> The evidence supports the finding that the payments were made in lieu of wage increases. While not tied directly to hours worked, the correlation in the eligibility provisions between work and bonus receipt supports the conclusion that the bonuses were compensation for employment. . . .
>
> Based upon the interpretation of the relevant statute, and the characteristics of the lump sum payments as compensation for hours worked, these sums are to be included in the employee's regular rate of pay for purposes of the statutory overtime calculation. [Pet. App. 29a, 31a].

The court of appeals reversed. That court was of the view that "the fact that the entitlement to these payments was dependent on an employee's having been with the employer for a certain period of time does not support the conclusion that the payments were compensation for employment." Pet. App. 9a. Rather, according to the court of appeals:

> The facts show that these payments were nothing more and nothing less then an inducement by the employers to ratify the agreement on the terms proposed by the employers. The employers obviously not wanting to pay a greater number of employees than they had to in order to achieve ratification, targeted that minimum number of employees necessary to achieve that goal, and therefore structured the eligibility requirements accordingly.[8] *If the payments were made as compensation for hours worked or services provided, the payments would have been conditioned on a certain number of hours worked or on an amount of services provided.*
>
> ---
>
> [8] The selective purpose of the payments is evident in the fact that employees similarly situated except for length of service were treated differently with respect to entitlement to these payments.
>
> [Pet. App. 12a; emphasis supplied.]

Judge Sloviter dissented, relying heavily upon two Department of Labor regulations which demonstrate that a "payment may be 'compensation for hours of employment' even if it is not tied to specific hours worked." App. 19a. Giving deference to the regulations disregarded by the majority, Judge Sloviter concluded that there is "no statutory support for the majority's conclusion that the statute requires exclusion from the 'regular rate of pay' of bonuses bargained for and paid to employees who must have worked a specified period before they could be eligible therefore." Pet. App. 21a. And Judge Sloviter stressed that any contrary view "will open the doors to widespread evasion of the overtime provisions of the Fair Labor Standards Act":

> [T]he Brief for one of the amici notes that it has been reported that "one-third of all non-construction bargaining agreements negotiated in 1986 contain provisions for some form of lump sum payments." Brief of Amicus Curiae Chamber of Commerce at

> 4 . . . If the lump sum payments referred to are, as in this case, substitutes for compensation for services performed, then the era of evasion is already upon us. I find it difficult to believe that Congress envisioned that the bargaining parties could agree to substitute nondiscretionary, collectively bargained bonuses in lieu of wages and thereby decrease the amount of overtime that must be paid to the workers. [Pet. App. 21a-22a].

REASONS FOR GRANTING THE WRIT

In 1984, the Union and the Employers included in their collective bargaining agreements, in lieu of ordinary wage increases in the first two of the three years covered by that agreement, two bonus payments. Pet. App. 26a. As the record in this case, as well as more recently published statistics, establish, the practice of providing lump sum payments in collective bargaining agreements instead of the more traditional hourly or weekly wage increases has become exceedingly common in recent years. In both 1986 and 1987, for example, about one third of all non-construction bargaining agreements in one broad survey contained some form of lump sum payments, up from less than one fifth in 1985. Pet. App. 14a, 21a; R. 45; Bureau of National Affairs, *Collective Bargaining Negotiations and Contracts*, 18:451-32. Moreover, in 1987 seventy percent of agreements with first year wage freezes provided for lump sum payments. *Collective Bargaining Negotiations and Contracts, supra*, at 18:451-52.

The court of appeals held in this case that by following this widespread practice rather than paying employees the same total cash amount on a weekly or hourly basis, employers can significantly decrease the rate of the statutory time-and-a-half overtime pay due employees under § 7 of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 207: According to the court of appeals, such lump sum payments are not part of an employee's "regular rate at which he is employed" (§ 7(a), 29

U.S.C. § 207(a)), and are therefore not included in calculating the "compensation . . . at a rate not less than one and one-half times the regular rate at which he is employed" due under the statute for each hour worked over forty hours a week.

As the dissent in this case stated, that holding "opens the doors to widespread evasion of the overtime provisions of the Fair Labor Standards Act." Pet. App. 21a. Under the court of appeals' opinion, employers would be able to decrease their overtime costs by the simple expedient of shifting cash recompense for employment from payments pegged directly to hours worked or amount produced to less frequent payments pegged more generally to services rendered. The result would be to encourage employers to work employees longer hours; to limit the compensation employees receive for the inconveniences and wear and tear of overtime work; and to discourage, rather than encourage, the spreading of work among more employees.

All of these results are squarely contrary to the FLSA's purposes as elaborated in this Court's opinions. Not surprisingly then the court of appeals' decision in this case is squarely contrary to the language and structure of the overtime provisions of the FLSA, as well as to the Department of Labor interpretation of those provisions.

In particular, the decision below is inconsistent with (1) the plain language of the FLSA; (2) this Court's directives concerning the role of the Department of Labor in the interpretation of the FLSA; (3) the purpose of the overtime provisions of the Act, as delineated in several opinions of this Court, and (4) the principle reiterated by this Court that the words or format used by the parties to a collective bargaining agreement cannot be allowed to defeat those purposes.

Further, the court of appeals relied upon a rationale that, if allowed to stand, could sanction widespread confusion about, and evasion of, the overtime pay provisions of the FLSA with regard not only to lump sum pay-

ments in lieu of wages, increasingly popular in collective bargaining agreements, but also to many other kinds of payments to employees that are not directly pegged to the amount of hours worked or services provided.

In sum, the decision below is not simply wrong it is indefensible. And that decision does not simply create isolated mischief, it threatens the very basis of the most basic of the federal labor standards provisions. This Court's plenary review is urgently needed.

1. Section § 7(a) of the FLSA, 29 U.S.C. § 207(a), provides that "no employer shall employ . . . his employees . . . for a workweek longer than forty hours unless such employees receives compensation for his employment [over forty hours] at a rate not less than one and one-half times the regular rate at which he is employed." Section 7(e), 29 U.S.C. § 207(e), in turn provides that the "regular rate" includes "all remuneration for employment paid to, or on behalf of, the employee", except seven enumerated categories of payments.[3] The court of appeals regarded the payments in this case as outside the "regular rate" for purposes of calculating overtime amounts because exempt under § 7(e)(2) as a

> payment[] made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payment[] for

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[3] Section 7(e) was added to the FLSA in 1949. Prior to that, there was no definition of "regular rate" in the statute. The intent of the 1949 amendments was not to alter the previous statutory purpose or application, but rather to

> remove, so far as possible, any uncertainty as to meaning, and to provide explicit guidance for affected employers and employees and for the officials charged with the duty of administering the law. With this end in view, the bill defines and delimits in some detail the payments to employees which the committee believes should be excluded in computing the regular rate of pay, and makes it clear that all other remuneration for employment should be included in calculating this rate. [H. Rep. No. 267, 81st Cong., 1st Sess. p. 6 (1949).]

> traveling expenses, or other expenses, incurred by an employer in the furtherance of his employer's interests and properly reimbursable by the employer; [or] *other similar payment*[] *to an employee . . . not made as compensation for his hours of employment.* [Emphasis supplied.] [4]

As read by the court of appeals, the italicized phrase in § 7(e)(2) exempts from the "regular rate" for overtime purposes any payments made by an employer to an employee not measured by a *precise* number of hours or amount of service. This is so, according to the court of appeals, even where, as here, there is a requirement that a stated level of service as an employee be rendered to be eligible for payment, and even where, as here, *the parties regarded the payments as a direct cash substitute for periodic cash payments* in recognition of incremental amounts of work performed, *viz.* as a substitute for wages in the traditional sense.[5]

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[4] The part of § 7(e) that most naturally governs payments of the kind here at issue is § 7(e)(3)(a). That section exempts from the "regular rate"

> [s]ums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly. . . .

As the court of appeals recognized, however, the payments here at issue plainly do not fall within that section. Pet. App. 13a. The reason is that the payments were *not, either* as to fact of payment or amount, "determined at the sole discretion of the employer." Rather, the payments were established by contract. As the Department of Labor's interpretive regulations therefore state, "any bonus which is . . . the result of collective bargaining would not be excluded from the regular rate under this provision of the Act." 20 C.F.R. § 778.211. *See also* Department of Labor Opinion Letter, October 15, 1981 (R. 26).

[5] The court of appeals regarded this latter fact as of little relevance because

> [a]ll remuneration by an employer comes at the expense of wage increases. Employers have a finite amount to spend for

The FLSA, however, establishes *no* such requirement. Rather, the general statutory definition of "regular rate" contained in § 7(e) includes "*all* remuneration for employment." And the court of apepals recognized, in the sense of giving lip service to, the principle that any exception to this "all inclusive rule" must be "narrowly construed . . . *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290, 295-96 (1959) . . . and the employer bears the burden of establishing the exemption. *Idaho Sheet Metal Workers, Inc. v. Writz*, 383 U.S. 190, 209 (1966)." Pet. App. 7a.

Thus, the point of the Act is that as long as a payment flows from the employment relationship and is in some sense a recognition for services performed, it is "remuneration for employment," however that payment is calculated unless one of the § 7(e)'s express exceptions "narrowly construed" applies. And the evident intent of the exception contained in § 7(e)(2) is to exempt payments that are compensation for something *other than*

> the labor component of their product or service. This sum can be allocated solely as compensation on a hourly basis. . . or it can assume any number of other forms, including insurance or medical benefits, paid vacation, etc. . . . Therefore, to state as the district court did that the payments at issue were made in lieu of wage increases is true, but that does not necessarily preclude their falling within the language of the exclusions contained in section 207(e), since certain wage substitutes are excluded under this section. [Pet. App. 8a.]

These payments, however, are wage substitutes not only in the sense that the payments are from an employer's viewpoint an aspect of the "labor component" of the business but also in that, *unlike* fringe benefits such as medical benefits or pensions or vacations, such payments are economically interchangeable with wages from an *employee's viewpoint* as well. That is, such payments, because they are unencumbered cash to be used in any way an employee sees fit, serve precisely the same economic function for the employee as ordinary wages—*vis.*, paying such expenses as the employee chooses to incur--and, unlike other payments such as holiday or vacation pay, they provide no other benefits than cash—such as time off from work—to the employee.

time spent working (for example, time spent not working, or money avdanced, or equipment supplied to the employer, or the inconvenience of coming to work when no work is available).

Nothing in the section suggests that a payment that *is* in recognition of services performed is *not* "remuneration for employment" in the statutory sense in *all* situations in which the payment is *not measured directly* by the number of hours or amount of services provided. The FLSA, in other words, is *not* based on the theory that to be "compensation for . . . hours of employment", a payment need be calibrated exclusively to the number of hours of employment; the payment can be measured in some other way, and still serve to compensate an individual for time at work.[6]

3. The Department of Labor takes precisely this commonsense view of the statute. According to the Department, the "other similar payments" exception of § 7 (e) (2) covers payments that

> must be 'similar' in character to the payments specifically described in section 7(e)(2). *It is clear that the clause was not intended to permit the exclusion from the regular rate of payments such as bonuses or the furnishing of facilities like board and lodging which, though not directly attributable to any particular hours of work are, nevertheless, clearly understood to be compensation for services.* [29 C.F.R. § 778.224(a); emphasis supplied.]

Further, according to the Department, several kinds of bonus payments which are not calibrated to particular hours worked, such as "[b]onuses which are announced

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[6] To read the provision otherwise would seem to except, for example, salaries paid regardless of hours worked, length-of-service differentials in salaries, merit increases, shift diffentials, and all manner of other criteria that govern who gets paid what amount other than the number of hours worked or the amount of goods produced.

to employees to induce them to work more steadily or more rapidly or more efficiently or to remain with the firm are regarded as part of the regular rate of pay," 29 C.F.R. § 778.211(c), as long as those bonuses are not so discretionary as to be covered by § 7(e)(3). *See* n. 4, *supra*.[7]

These codified interpretative rulings of the Department of Labor were disregarded by the court of appeals. In so doing that court proceeded in a fashion contrary to this Court's long-established directives concerning the weight to be given to the Department's understanding of the FLSA:

> [T]he Administrator's policies are made in pursuit of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case. They . . . determine the policy which will guide applications for enforcement by injunction on behalf of the Government. Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons. . . . We consider that the rulings, interpretations and opinions of the Administrator upon this Act, while not concontrolling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such judgment in a particular case will depend upon the

[7] While taking no definitive position regarding any particular bonuses, the Secretary reiterated the general views quoted in the text in the letter written in response to the Union's general inquiry regarding the status of bonuses such as the ones involved in this case. *See* p. 6, *supra*. R. 35. In particular, the Department was of the view that "where an employee must be on the payroll in order to receive a future bonus payment, the payment would be regarded as remuneration for employment which would be included in the regular rate under the Act." R. 36. That description, of course, fits precisely the second-year bonus involved in this case.

> thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those facts which give it power to persuade, if lacking power to control. [*Skidmore v. Swift*, 323 U.S. 134, 139-40 (1944)].

In this instance, the Department's interpretative memoranda are well-supported by the statutory structure and purpose while the court of appeal's contrary view creates several insoluble conceptual problems.

First, on the view taken by the court of appeals, both § 7(e)(1) and § 7(e)(8)(a) would make little sense. Section 7(e)(1) is an exception for *certain* "payments in the nature of gifts": those "made at Christmas time or on other special occasions" *and* "not measured by or dependent on hours worked, production, or efficiency." On the court of appeals reading of § 7(e)(2), the latter limitation in § 7(e)(1) would be entirely redundant, since all payments "not measured by or dependent on hours worked, production, or efficiency" would necessarily be excepted by § 7(e)(2), whether the payments were "made at Christmas or on other special occasions" or not.

Moreover, § 7(e)(3)(a) excepts "[s]ums paid *in recognition of service*" (emphasis supplied), but, again, only under limited circumstances. *See* n. 4, *supra*. Where those circumstances do not apply, it would appear that Congress was of the view that generally "sums paid *in recognition of service*" (emphasis supplied), however those sums are measured, are to be included in "remuneration for employment" and therefore in the "regular rate." Otherwise, there would be little point in using the broad phrase "in recognition of service" in this subsection. On the court of appeals analysis, however, *no* traditional bonuses, including those *promised* as a condition of employment and clearly "in recognition of service", would be included in the regular rate of pay for calculating overtime rates: Such bonuses are not generally calibrated, as are incremental wage payments, to hours worked or goods produced, but rather are by defi-

nition a monetary amount *in addition* to the amounts thus calculated.

Further, the Department's view, and not that taken by the court of appeals, is the one that comports with this Court's analyses of the purposes served by the overtime provisions of the Act. Those purposes "were to compensate those who labored in excess of the statutory maximum number of hours for the wear and tear of extra work and to spread employment by inducing employers to shorten hours because of the pressure of extra cost." *Bay Ridge Operating Co. v. Aaron*, 344 U.S. 446, 460 (1948). This Court has therefore always insisted "that mere words in a contract can[not] fix the regular rate," (*id.*, at 462), nor is the regular rate determined by "an arbitrary label chosen by the parties." *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424 (1945). Rather, if employees are to be *additionally* compensated, at a time-and-one-half rate, for extra work, and if employers are to that extent to feel the pressure of *extra* cost above that paid without overtime, " 'regular rate' [must] obviously mean the hourly rate *actually paid* for the normal, non-overtime workweek." *Walling v. Helmerich & Payne*, 323 U.S. 37, 40 (1944). Thus,

> [o]nce the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary 'regular rate' in the wage contracts. [*Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. at 424].[8]

The very point of determining the "regular rate" as an "actual fact" (*149 Madison Ave. Corp. v. Asselta*, 331

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[8] Although this Court's cases concerning the "regular rate" for overtime purposes were decided before § 7(e) was enacted in 1949, that provision was intended for the most part to codify rather than to overrule judicial interpretations. *See*, n.3, *supra*. The Secretary and the courts have therefore continued to apply the same concepts articulated in the cases cited in the text. 29 U.S.C. § 778.108; *e.g. Brennan v. Valley Towing Co., Inc.*, 515 F.2d 100, 105 (1975).

U.S. 199, 204 (1947)) is to preclude the situation in which the "regular rate" is dependent on the particular way in which an employer arrives at the amount of money paid to a particular employee for his services, since the mode of calculation is both irrelevant to the statutory purposes and open to manipulation.

For example, if an employer pays a weekly salary to an employee regardless how many hours he or she worked or how much he or she produced (as many employers do), the salary is obviously "compensation for hours of employment," not excludable from the "regular rate". *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 580 (1942); *Highlander v. K.F.C. National Management Co.*, 805 F.2d 644, 647-48 (6th Cir. 1986). The result is the same where compensation is paid quarterly or annually rather than weekly.[9] Thus, to read § 7(e)(2), as did the court of appeal, as permitting employers to artifically decrease the overtime rate by providing compensation that is not precisely calibrated according to the hours worked or the amount produced but according to some more general measure of services rendered is fundamentally to undermine the FLSA's overtime provisions as construed by this Court.

In this instance, the bonus payments were considered by the parties as functionally equivalent to the wage component of the agreement; were paid only to employees with stated durations of active service; and, as to the second year bonuses, were available only to employees who were at work a year after the effective date of the agreement. As such, the payments were in no way exter-

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[9] The Second Circuit forty years ago explained why this is so:

> [T]he relationship between bonus and work is the same as that between weekly wages and work. Each is the consideration in whole or part for the other . . . The creation of a . . . bonus system . . . is an incentive to continuity and length of service and thus follows the normal objectives of both labor, and management. [*Walling* v. *Garlock Packing Co.*, 159 F.2d 44, 46 (2d Cir. 1947)].

nal to the employment relationship, but were cash compensation for employment. Under the Department's interpretation of the statute in its promulgated interpretive regulations, these payments are therefore part of the "regular rate" used in calculating overtime payments.

4. The reasoning of the court of appeals to the contrary depends on two interrelated principles for characterizing the bonus payments as something other than compensation for employment. Each principle fundamentally misconceives the proper inquiry under the FLSA and, if allowed to stand, leads to the exclusion of many kinds of payments to employees that have long been regarded as part of the "regular rate" for FLSA purposes.

The first principle is that the durational eligibility requirements do not demonstrate that the payments are compensation for employment if the employers' *motive* in imposing those requirements is to hold costs down. Pet. App. 9a. But employers are, of course, always motivated by a desire to keep costs down. That the decision to limit the availability of compensation was cost-driven must be viewed as irrelevant to the question whether the course of action actually chosen provides compensation linked to employment or employee status; otherwise the FLSA overtime provisions become all but meaningless.[10]

The second rationale provided by the court of appeals for concluding that the payments in question were not compensation for employment similarly confuses the em-

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[10] For example, in this instance, having decided to limit the bonus payments for reasons of cost containment, the Employers could have made the payments on a first-come, first-served basis, or on the basis of employees' last names, etc. Thus, the cost-containment rationale is an inadequate explanation for the choice of eligibility requirements. That the employers chose to base payment upon durational employment and presence at work on certain days criteria indicates that the employer was interested in rewarding employment-related services, and not simply in arbitrarily cutting costs.

ployer's motives for agreeing to a certain payment to employees with the statutory characterization of that payment. In the court of appeal's view, where the employer agreed to the payments in order to assure ratification of the agreement, the payments are not compensation for hours of employment and are excludable under § 7(e)(2) of the Act. Pet. App. 12a.

As the district court pointed out, employers who bargain collectively with unions whose members ratify agreements by majority vote must necessarily take into account which changes are likely to encourage ratification and which are not. Again, such strategic considerations in structuring compensation, as well as in structuring other aspects of the agreement, must be considered irrelevant in determining which contractual provisions are compensation for employment and which are not, or the FLSA overtime provisions become inoperative in the collective bargaining context.

For example, an employer may believe that long-term employees are more influential in the bargaining unit in convincing others to approve a contract, and for that reason may provide hourly wage increases for them but not for other employees. That the employer had such considerations in mind cannot alter the conclusion that the hourly compensation paid to the long-term employees during the term of the contract *is* part of their compensation for employment, whatever the employer's motive in agreeing to that compensation may have been.[11]

---

[11] In propounding the ratification rationale, the court of appeals relied in part upon a 1981 Department of Labor opinion letter that recognized that under some circumstances a lump sum payment made in the content of settling a strike may be excluded from the "regular rate" under § 7(e)(2). Pet. App. 8a. That letter, however, clearly viewed the circumstances of the labor dispute in that instance as unique, and expressly cautioned that "should such payments become a regular practice in settling labor disputes, we would be inclined to view them as an advance of compensation for the period of the new collective bargaining agreement and as such, would appropriately be apportioned into the regular rate of pay." R. 26. *See also* R. 82 (Department of Labor letter dated Augst 25,

Thus, neither the employer's cost considerations nor the employer's strategic considerations concerning the likelihood of contract ratification should have any place in determining as the "actual fact" whether a particular payment to employees is "compensation for hours of employment" or not. The court of appeals decision to the contrary, if permitted to stand, will create substantial uncertainty in the negotiation of collective bargaining agreements: If overtime calculations depend upon an employer's subjective motives in agreeing to one or another element of compensation, the parties to negotiations will have no objective way to calculate the likely cost of any proposals. Moreover, identical provisions in various contracts could be treated differently depending upon the precise course of negotiations leading up to them, or upon later testimony by employers concerning their frame of mind in agreeing to those provisions.

This Court has cautioned:

> [F]reedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes. . . . Any other conclusion . . . would exalt ingenuity over reality and would open the door to insidious disregard of the rights protected by the Act. [*Walling v. Helmerich & Payne, Inc.*, 323 U.S. at 42].

The court of appeals opinion in this case indubitably encourages the exaltation of "ingenuity over reality", by providing a way to shift significant portions of an employee's recompense for non-overtime employment into payments not included in calculating the overtime rate.

Given the burgeoning role of lump sum bonus payments in lieu of wages in collective bargaining agreements, the question whether this practice is indeed an "insidious dis-

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1982, reiterating that caution). As recent statistics suggest (p. 8, *supra*), lump sum "ratification" bonuses have indeed become a "regular practice in settling labor disputes."

regard of the rights protected by the Act" is a critical one in modern labor relations, and merits this Court's attention.

CONCLUSION

For the foregoing reasons, the Court should issue a writ of certiorari to the United States Court of Appeals of the Third Circuit.

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88-346

No. ——

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ANTHONY MINIZZA, *et al.*,
Petitioners,

v.

STONE CONTAINER CORP. CORRUGATED CONTAINER DIV. EAST PLANT, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 87-1348

MINIZZA, ANTHONY, *et al.*,

v.

STONE CONTAINER CORP.
CORRUGATED CONTAINER DIV.
EAST PLANT,
CHESAPEAKE CORRUGATED CO.,
OWENS-ILLINOIS, INC.,
STONE CONTAINER CORP. WEST PLANT,
STONE CONTAINER CORP. EAST PLANT,
Appellants.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 86-3862)

Argued December 17, 1987

Before: GIBBONS, *Chief Judge*,
SLOVITER and COWEN,
Circuit Judges

(Filed March 28, 1988)

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OPINION OF THE COURT

COWEN, *Circuit Judge.*

This appeal arises from an order of the district court, which required that defendant employers' payment of two lump sum amounts, pursuant to the terms of a collective bargaining agreement be included in the "regular rate" for purposes of calculating overtime rates under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.* Since we conclude that these payments are excluded from regular rate calculations because they are similar to the types of payments excluded under 29 U.S.C. § 207(e)(2), we will reverse.

I.

This controversy arose out of the filing of eleven separate, albeit identical, lawsuits by plaintiff employees who are members of the United Paperworkers International Union Local 375 ("Union"). The employees alleged that their employers violated section 207(a) of the FLSA [1] by

---

[1] Section 207(a)(1) states:

> (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives com-

excluding certain lump sum payments they received pursuant to the terms of collective bargaining agreements between the Union and the employers from their regular rate of compensation in calculating overtime pay.

The employers were each parties to collective bargaining agreements with the Union and, with the exception of Stone West,[2] joined together as the Philadelphia Container Association for the purpose of negotiating a new agreement with the Union in May of 1984. Prior agreements had included annual increases in hourly wages and other benefits. In these negotiations, however, the employers sought a new agreement with a freeze on hourly wages and a cap on medical insurance costs.[3]

After considerable bargaining and a rejection of one proposal by vote of the Union rank and file, an agreement was reached between the parties. One of the terms of the new contract was the payment in the first year of the agreement of a lump sum of $750.00, payable on July 1, 1984, and an additional payment in the second year of the contract of $500.00, payable on July 4, 1985.[4] To be eligible for the first year payment, the employee had to have been an active employee for three months

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pensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(a)(1) (1982).

[2] Stone West, at the time recently purchased from another entity and operated apart from the Stone East plant, negotiated a separate agreement with the Union on the same economic terms.

[3] The employers assumed this position in an effort to make themselves more competitive with rivals who were paying lower wages.

[4] The agreement also provided for minimal hourly wage increases in the second and third years of the agreement of 15 and 50 cents per hour, respectively, a decrease in the wage rate for newly hired employees (creating a two-tiered wage rate), and a $250.00 deductible on the health insurance plans. The term of the agreement was also extended from 3 to 36 months.

prior to the date of the payment. In order to qualify for the second year payment, the employee had to have six months active status prior to the payment date. Employers on long-term disability or lay-off returning within 12 months of the bonus date received a pro-rata share.

The lump sum payments were negotiated as a trade-off for wage increases and also served as an inducement to the employees to ratify the agreement, given the employers' minimal wage concessions and insistence on including medical deductibles. Although similar payments of a lesser amount were included in the first agreement rejected by the employees, the substantial increase in the amount of the sums which were to be paid on an earlier schedule than first proposed, along with the small ten-cent-per-hour wage increase in the third year of the contract, were sufficient inducement to convince the Union members to ratify the second agreement.

The parties agreed that there would be no "roll-up" effect of the lump-sum payments, that is, the amounts would not be included in wages for purposes of calculating holiday pay, worker's compensation premiums, FICA, FUTA, and overtime. Nevertheless, in September of 1984, counsel for the Union expressed his opinion that the payments should be included in the base rate for purposes of calculating overtime. The employers disagreed and therefore refused to calculate overtime using these sums.

In March of 1985, the Union's parent organization, United Paperworkers International Union, requested an advisory opinion from the Wage and Hour Division of the Department of Labor regarding the excludability of these payments from overtime calculations. In a letter dated April 21, 1986, however, the Department of Labor responded equivocally, stating, in part:

> Because there is so much variation in the form of these bonuses, and because the employees involved

> are collectively represented, it is our view that, as a general matter, this is an area in which compliance with the provisions of the Act is best left to the parties to achieve, through litigation or otherwise.

App. at 36. The members thereafter initiated suit and the eleven separate cases were consolidated for all purposes into Civil Action No. 86-3862. The parties stipulated to a bifurcation of the issues of liability and damages. After a trial, the district court found for plaintiffs on the question of liability, *Lopez v. Art Craft Containers, Corp.*, 660 F. Supp. 404 (E.D. Pa. 1987), the court determining that the payments did not fall within any exclusion contained in the FLSA, and that the employers therefore should have included the payments in overtime calculations. Thereafter, the Court determined the method by which damages would be calculated, and by stipulation the parties agreed that damages would be awarded based on this or whichever formula was upheld on appeal. The Court's order became final on June 19, 1987. The employers appeal to this Court. We have jurisdiction pursuant to 28 U.S.C. § 1291.

II.

On appeal the employers argue that the district court erred when it determined that the payments made pursuant to the collective bargaining agreement under these facts were not subject to exclusion from the "regular rate" under one of the exemptions to the FLSA for purposes of calculating overtime. The district court's findings of fact in that regard may not be disturbed unless clearly erroneous. *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985). However, our review of the district court's interpretation and application of the statutory language is plenary. *Creque v. Luis*, 803 F.2d 92, 93 (3d Cir. 1986). We turn to an examination of the reasons underlying the district court's decision.

III.

A.

The FLSA requires that employees working more than forty hours a week be compensated at a rate one and one-half times their regular rate for any hours exceeding forty. 29 U.S.C. § 207(a)(1). The scope of the term "regular rate" is defined to include "all remuneration for employment paid to, or on behalf of, [an] employee." *Id.* § 207(e). However, there are several exceptions to the otherwise all-inclusive rule set forth in section 207(e). As the district court correctly recognized, these exceptions are narrowly construed, *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290, 295-96 (1959); *Guthrie v. Lady Jane Collieries, Inc.*, 722 F.2d 1141, 1143 (3d Cir. 1983), and the employer bears the burden of establishing an exemption, *Idaho Sheet Metal Workers, Inc. v. Wirtz*, 383 U.S. 190, 209 (1966); *Guthrie*, 722 F.2d at 1143. Nevertheless, we must differ with the conclusion drawn by the district court that the payments were not exempted for several reasons.

First, as one of the bases for its holding, the district court determined that the payments were compensation for hours of employment, stating: "While not tied directly to hours worked, the correlation in the eligibility provisions between work and bonus receipt supports the conclusion that the bonuses were compensation for employment." 660 F. Supp. at 407. The district court found evidence in the contract negotiations that the payments were tied to proposals for cents-per-hour increases, and concluded that the payments were made in lieu of wage increases.

The employers aver that this determination is irrelevant to an analysis under the FLSA. While we cannot say that the finding of a trade-off of the payments for a smaller increase in wages was irrelevant to the issue before the district court, it is of little help in setting the ultimate question whether the payments may be excluded.

All remuneration by an employer not paid directly in dollars-per-hour comes at the expense of wage increases. Employers have a finite amount to spend for the labor component of their product or service. This sum can be allocated solely as compensation on an hourly basis (in which event the payment would be fully includable in the "regular rate"), or it can assume any number of other forms, including insurance or medical benefits, paid vacations, etc. (in which case the payments may or may not be includable), in any ratio the parties care to set. However, as there is a limit to the labor cost component, there will always be a trade-off between wages and wage substitutes, such as these payments. Therefore, to state as the district court did that the payments at issue were made in lieu of wage increases is true, but that does not necessarily preclude their falling within the language of the exclusions contained in section 207(e), since certain wage substitutes are excluded under this section.[5]

As an additional factor in its determination that the payments were compensation for hours of employment, the court below looked to the fact that there was a time-of-service-related work prerequisite for receiving the payment; that is, an employee could not receive the payment unless he had worked for a minimum period of time preceding the payment date. The employers argue that the eligibility standards do not convert the payments into

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[5] Indeed, as noted by the employers, the Department of Labor in an opinion letter dated October 15, 1981, took the position that certain lump sum payments would not be included in overtime calculations under section 207(e)(2). The employers argue strenuously that, based on this letter opinion and subsequent reaffirmations of this 1981 letter, the DOL has assumed a favorable position with respect to the payments herein. We cannot accept this argument since it is obvious in the DOL's 1986 opinion letter that the Department, after considering these particular payments, did not take a position either way. *See infra* note 6. However, the DOL's 1981 letter opinion does lend support to the employers' argument that lump sum payments can be included within the language of section 207(e)(2), depending on the payment's characteristics.

compensation for employment because the employees need not have actively engaged in employment prior to receiving the payment, nor were they required to continue employment after receiving the lump sum. In addition, the employers point to testimony which they argue establishes that the eligibility requirements were not tied to hours worked and were inserted to hold down labor costs.

In our view, the fact that the entitlement to these payments was dependent on an employee's having been with the employer for a certain period of time preceding the payment does not support the conclusion that the payments were compensation for employment. A review of the eligibility terms reflects a requirement only that a payee achieve the status of an active employee for a specified period of time prior to receipt. It does not matter how many hours an employee worked during that period, nor how many hours he might work in the future. The employee could even terminate his employment immediately upon receiving the payment and retain the payment.

Furthermore, the undisputed testimony reflects that the eligibility requirements were included solely to hold down the employer's costs. App. at 510-11. As the employers note, all the employees could have been made eligible for the bonus. However, this alternative would have cost the employers more than if they were able to exclude some of the employees, as the employers chose to do. Ironically, if the employers had paid the lump sum to all employees there could be no argument that the eligibility conditions were tied to compensation for hours of employment as there then would be requirements. In that case, the attention would be focused solely on the character of the payments, which we believe to be the key inquiry in this case. *See* Section II.B., *infra*. We see no reason why we should come to a different conclusion where the evidence reflects that requirements were imposed solely for reasons of cost containment, and were not an attempt to tie payments to compensation for services rendered.

In light of the evidence that the eligibility requirements were not meant to serve as compensation for service, but rather to reduce the employers' costs, and considering that the eligibility terms themselves do not require specific service, we conclude that the eligibility terms do not lend support to the conclusion that the payments are compensation for employment. Thus, we reject the district court's determination of this issue.[6]

B.

The second reason underlying the district court's decision was its determination that as a matter of statutory interpretation the payments were dissimilar in character to those listed in section 207(e)(2), the only exception arguably applicable under these facts. This particular exclusion exempts from the definition of "regular rate"

> payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; *and other similar payments to an employee which are not made as compensation for his hours of employment*; . . .

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[6] The Department of Labor's opinion letter dated April 21, 1986, which both the employers and the employees maintain supports their respective positions, suggests that any payment tied to a past or future period of employment would not be excludable. However, as noted above, the DOL refused to take a position on these payments, preferring to let the parties settle any dispute through litigation or otherwise. While an administrator's determination under the FLSA is entitled to some deference, *see Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *see also Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980) (federal agency's interpretation of a statute over which it has been given administrative duties is entitled to great deference), *Udall v. Tallman*, 380 U.S. 1, 16 (1965) (same), we find the administrator's letter to be equivocal and therefore unpersuasive either way.

29 U.S.C. § 207(e)(2) (1982) (emphasis added). The phrase "other similar payments" is further clarified in the Code of Federal Regulations:

> Section 7(e)(2) also authorizes exclusion from the regular rate of "other similar payments to an employee which are not made as compensation for his hours of employment." Since a variety of miscellaneous payments are paid by an employer to an employee under peculiar circumstances, it was not considered feasible to attempt to list them. They must, however, be "similar" in character to the payments specifically described in section 7(e)(2). Is is clear that the clause was not intended to permit the exclusion from the regular rate of payments such as bonuses or the furnishing of facilities like board and lodging which, though not directly attributable to any particular hours of work are, nevertheless, clearly understood to be compensation for services.

29 C.F.R. § 778.224(a) (1987).

The district court, relying on the explanation embodied in the regulation, decided that the payments to be included in the phrase "other similar payments" could be similar in character only to the two categories of payments specifically listed in section 207(e)(2), pay for idle hours or reimbursements for work-related expenses. Since the court was of the opinion that the payments could not be classified as either of these kinds of payments, they did not fall within the exclusion. We find this interpretation erroneous because it focuses the analysis on the specific type of payment rather than whether the type of payment is compensation for hours worked or service rendered. Instead, we interpret the phrase "other similar payments" by reading each clause of section 207(e)(2) separately. The phrase "other similar payments . . . not made as compensation for hours of employment" does not mean just other payment for idle hours or reimbursements, the two types of payments set forth in the two

preceding clauses of the section, but payments not tied to hours of compensation, of which payments for idle hours and reimbursements are only two examples. This interpretation gives independent meaning to the third clause. Indeed, it makes little sense to read the third clause as only an embellishment of the first two, since those two clauses contain "other similar" language as well.[7]

The employers assert, and we agree, that the payments are included within the highlighted language of section 207(e)(2) because they are similar in character to the other payments set forth in that section; that is, they are not payments relating to hours of employment or service. The facts show that these payments were nothing more or less than an inducement by the employers to the employees to ratify the agreement on the terms proposed by the employers. The employers, obviously not wanting to pay a higher number of employees than they had to in order to achieve ratification, targeted that minimum number of employees necessary to achieve that goal, and therefore structured the eligibility requirements accordingly.[8] If the payments were made as compensation for hours worked or services provided, the payments would have been conditioned on a certain number of hours worked or on an amount of services provided. However, no such requirement was agreed to by the parties.

In sum, we must reject the district court's determination that the payments would not fall within the language of section 207(e)(2). To the contrary, we conclude the

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[7] The first clause states: "[P]ayments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, *or other similar cause*; . . ." 29 U.S.C. § 207(e)(2) (emphasis added). The second clause reads: "[R]easonable payments for traveling expenses, *or other expenses*, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; . . ." *Id.* (emphasis added).

[8] The selective purpose of the payments is evident in the fact that employees similarly situated except for length of service were treated differently with respect to entitlement to these payments.

payments here share the essential characteristic with the other types of compensation specifically included in section 207(e)(2) of not being compensation for hours worked or services rendered. Accordingly, they fall within the language of the exception and are excluded for purposes of calculating overtime compensation rates.

C.

As a third basis for its holding, the district court concluded that since the payments were made to induce ratification of the agreements, they could most readily be characterized as bonuses. Since the payments were not discretionary and were paid pursuant to a prior agreement, the district court reasoned they fell outside the exclusion contained in section 207(e)(3). The court below also found significant the fact that Congress addressed excludable bonuses in section 207(e)(3) only, implying that it meant to include all other types of bonuses not falling within section 207(e)(3).

In light of our holding that the payments are excluded from overtime calculations under section 207(e)(2), we need not address the district court's characterization of the payments as bonuses.[9] We turn to this portion of the district court's analysis, however, to point out that while we agree with the district court that the payments in this case would not fall within the language of section 207(e)(3), the fact that Congress did not include other types of bonuses in this section does not mean that these payments would necessarily have been excluded.

The district court's comment in this regard infers that these types of payments were considered by Congress and

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[9] Our determination that the payments fall within the exclusion in (e)(2) would not change even if we term the payments "bonuses," since what the payments are termed is not important. *Walling v. Harnischfeger Corp.*, 325 U.S. 427, 430 (1945). What is important is the substantive characterization of the payments, which is not compensation for hours worked but rather as an inducement for ratification.

specifically rejected. This is unsubstantiated speculation. We have found nothing to indicate that Congress was aware of these types of payments at the time the exemption was enacted, and nonetheless decided to exclude them. It would be presumptuous to conclude that Congress meant to exclude payments such as these by not including them within the language of that section.

A large number of collective bargaining agreements throughout the country contain payments similar to those at issue in this case, and these provisions are becoming more common. *Collective Bargaining Negot. & Cont.* (BNA) No. 1091, at 18:451-52 (1987). We do not address whether all such payments are or are not excludable; that finding depends on the facts of the particular case. A fair assessment of the payments made in this case, however, reflects that the payments were not given as compensation for hours worked or services rendered. The FLSA was not intended to emasculate the ability of labor and management to be creative in resolving labor disputes in a manner which is mutually beneficial from an economic standpoint to all parties involved in such negotiations. The FLSA should not be used in this case as an impediment to creative and innovative collective bargaining which brings labor peace.[10]

IV.

We conclude that the lump sum payments in this case should not be considered compensation for hours of employment, and that they fall within the phrase "other similar payments" under 28 U.S.C. § 207(e)(2). Accordingly, these payments are excluded from the definition of "regular rate" for purposes of calculating overtime pay under the Fair Labor Standards Act. We therefore will reverse. The district court will enter judgment in favor of the employers. Each party to bear its own costs.

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[10] In light of our holding, we need not reach the employers' argument that the district court erroneously calculated damages.

SLOVITER, *Circuit Judge*, dissenting.

I respectfully dissent from the majority's decision reversing the district court's judgment requiring the employers to include the lump sum bonuses they paid to the employees as part of their regular rate of pay in calculating overtime. I do so for three reasons: first, I believe the majority has given insufficient deference to the district court's factual findings; second, I cannot agree with the majority's construction of the statute; and third, I fear that this decision places the court's imprimatur on a method of evading the FLSA and opens the door to widespread evasion.

I.

As the majority notes, the Department of Labor (DOL), the agency that has the responsibility for enforcing the Fair Labor Standards Act, has taken the position that the includability of bonuses in employees' "regular rate" requires an ad hoc determination based on the particular circumstances applicable in each case. It follows that a somewhat more extensive review of the negotiations leading to the 1984 agreement may be useful.

The negotiations were principally conducted on the employers' side by the Philadelphia Container Association, which represented all the defendants who remain as defendants here with the exception of Stone Container Corportation, West Plant (Stone West). Although the prior agreements with Local 375 (Union) had provided for annual wage increases, the employers this time, because of an adverse economic climate in the country and in the paper industry, sought to get the Union to hold the line on wages and make concessions in the medical benefits programs. As could be expected, the Union resisted.

At first, the employers requested a two-tiered wage system (lower rates for new hires) and the Union proposed an increase of $1.25 per hour for each year of the contract. The employers then proposed a bonus of $250

to be paid during the second and third years of the contract, with "no *other* wage or salary adjustments during the life of the Agreement." App. at 94 (emphasis added). Payment of a bonus in lieu of a wage increase can be advantageous to an employer because the parties can also agree not to factor the payment into the value of benefits such as vacation and holiday pay, *i.e.*, to preclude a "roll-up" effect, and because subsequent contract negotiations generally begin with the base rate of pay, which does not reflect the bonus.

The initial agreement reached by the negotiators here provided for a lump sum bonus of $500 at the beginning of the first year, $250 at the second, $200 at the third, with wages frozen the first year, a 15 cents per hour increase the second, and a 40 cents per hour increase in the third, as well as a $250 deductibility in medical plans. This agreement was rejected by the employees' vote.

Ultimately, the new three-year collective bargaining agreement reached on July 13, 1984 provided for a lump sum $750 bonus to employees on July 1, 1984, which was the starting date of the new contract, and $500 on July 1, 1985, one year later. In addition, the wage increase for the third year was raised to $.50 per hour and the employees agreed to extend the agreement to 36 months (rather than 33 months). To be eligible for the first-year bonus, an employee had to be actively employed for the three months prior to the date of payment; to be eligible for the $500 second-year bonus, an employee had to be actively employed for the six months prior to the date of the bonus. App. at 45. Anyone who was not on active status on the date of the bonus but returned from sick leave or was recalled from layoff in the 12 months following that date received a pro-rata share of the bonus, according to the number of months worked in that year. *Id.*

Months later, because counsel for the Union had concluded that the Fair Labor Standards Act required the

lump sum payments to be allocated on an hourly basis for use in computing overtime compensation, the Union wrote the Administrator of the Wage and Hour Division of the Labor Department in March 1985, requesting his opinion on whether the FLSA required the inclusion of the lump sum payments in the employee's "regular rate" for purposes of overtime compensation. The Deputy Administrator's response, dated April 21, 1986 ("1986 Opinion Letter"), concluded that it was a matter for the parties to work out, "through litigation or otherwise." App. at 36. The Union then filed this lawsuit.

After trial, the district court, sitting as the factfinder, found as one of its enumerated Findings of Fact that the payments were made "in lieu of wage increases"—that the bonuses were discussed at the contract negotiations under the subject of wages and recorded as such, were translated into cents-per-hour in the discusisons between the parties, and that the employer changed the bonus amounts it offered in response to, or in conjunction with, proposals for cents-per-hour increases. App. at 8. In its subsequent discussion, the district court stated that, "[w]hile not tied directly to hours worked, the correlation in the eligibility provisions between work and bonus receipt supports the conclusion that the bonuses were compensation for employment." App. at 11.

There is more than sufficient support in the record for the district court's findings that the bonuses were in lieu of wages to survive the "clearly erroneous" standard of review. The proposal offered to the Union by the Container Association, bargaining on behalf of the employers, listed its lump sum bonus proposal under the heading "Wages". App. at 94. The language of the sentence following that bonus proposal, which states that "[t]here shall be no *other* wage or salary adjustments during the life of the Agreement," *id.* (emphasis added), shows that the employer thought of the proposed bonuses

as a wage or salary adjustment. Both the first and second Memorandum of Agreement between the negotiating parties listed the bonuses under the topic "Wages", App. at 37, 62, and the final contracts negotiated list the bonuses under the title "Wages and Bonuses", App. at 45, or simply "Wages", App. at 75.

The majority, although never explicitly denominating as clearly erroneous the district court's finding that the bonuses were made in lieu of wage increases, nonetheless fails to give that finding the weight that it requires. Thus, for example, the majority states that "[t]he facts show that these payments were nothing more or less than [a ratification] inducement by the employers to the employees," and not payments relating to hours of employment or service. Maj. Typescript op. at 13. However, the district court *found* that the bonuses were no different than other terms of the agreement because—"[e]very aspect of a labor agreement is intended to induce ratification and achieve labor peace." App. at 8. It explained further, "an inducement to ratify is an inducement for future services." *Id.* The majority's finding that the eligibility requirements were simply to achieve ratification is a finding that we, as appellate judges, are not free to make since it is inconsistent with the finding made by the district court, supported by the record, that the bonuses were "compensation for employment." App. at 11.

II.

The majority concludes that the bonuses here are exempt from inclusion in the computation of the employees' "regular rate" pursuant to section 7(e) of the Act, 29 U.S.C. § 207(e). The definition of "regular rate" expressly includes "all remuneration for employment paid to, or on behalf, the employee," but sets forth seven exclusions to the regular rate, which include, *inter alia*,

> (2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses . . . properly reimbursable by the employer; *and other similar payments to an employee which are not made as compensation for his hours of employment;*
>
> (3) Sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; [(b) omitted].

(emphasis added).

The majority accepts the employers' argument that the bonuses fall within section (e)(2) above and are therefore "similar payments" because they share the character of the other payments set forth in that "they are not payments relating to hours of employment or service." Maj. Typescript op. at 13. Of course, if the district court's contrary finding is given appropriate weight, the majority's conclusions must fall.

It is important to note that a payment may be compensation for an employee's "hours of employment" even if it is not tied to specific hours worked. The DOL regulations in this regard provide:

> It is clear that the ["other similar payments"] clause was not intended to permit the exclusion from the regular rate of payments *such as bonuses* or the furnishing of facilities like board and lodging *which, though not directly attributable to any particular hours of work are, nevertheless, clearly understood to be compensation for services.*

29 C.F.R. § 778.224(a)–(1987) (emphasis added). Another regulation reinforces this interpretation, since it provides: "Bonuses which are announced to employees to induce them to work more steadily or more rapidly or more efficiently or to remain with the firm are regarded as part of the regular rate of pay. Attendance bonuses, individual or group production bonuses, bonuses for quality and accuracy of work, bonuses contingent upon the employee's continuing in employment until the time the payment is to be made . . . must be included in the regular rate of pay." 29 C.F.R. § 778.211. The DOL's interpretation of the statute as not requiring that compensation be pegged to a particular time period or number of hours worked is owed deference. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984).

Another reason these bonuses cannot be viewed as falling within the section 7(e)(2) exclusion is that they are not "similar" to the other payments specified in the other clauses of section 7(e)(2). As explained by the regulations, the first clause of section 7(e)(2), which speaks of payments made for "occasional periods" such as holidays, refers only to "absence of a nonroutine character which are infrequent or sporadic or unpredictable," 29 C.F.R. § 778.218(d) (1987), which was not the case here. Patently, as well, the bonuses were not "similar to" the reimbursement of expenses detailed in the second clause of section 7(e)(2). If the third clause of section 7(e)(2) was intended to encompass an independent class of payments, as the majority suggests, it is unlikely Congress would have defined that class only as "similar" to those in the two preceding clauses.

Finally, it is unlikely that Congress would have intended bonuses to be excluded under section 7(e)(2) when it provided another exclusion, section 7(e)(3), which deals directly with payments construed by DOL as covering certain bonuses. Significantly, section 7(e)

(3) only excludes bonuses given at the total discretion of the employer, which was clearly not the case with these negotiated payments. DOL's interpretative regulation states:

> The bonus, to be excluded under section 7(e)(3)(a), must not be paid "pursuant to any prior contract, agreement, or promise." For example, any bonus which is promised to employees upon hiring or *which is the result of collective bargaining would not be excluded from the regular rate under this provision of the Act.*

29 C.F.R. § 778.211 (emphasis added).

I thus find no statutory support for the majority's position that the statute requires exclusion from the "regular rate of pay" of bonuses bargained for and paid to employees who must have worked a specified period before they could be eligible therefor.

III.

My overriding concern with the majority's opinion in this case of first impression is that it will open the doors to widespread evasion of the overtime provisions of the Fair Labor Standards Act. Indeed, the brief for one of the amici notes that it has been reported that "one-third of all nonconstruction bargaining agreements negotiated in 1986 contain provisions for some form of lump sum payments." Brief of Amicus Curiae Chamber of Commerce at 4 (citing *Collective Bargaining Negotiations and Contracts* (BNA), 18:451-452). If the lump sum payments referred to are, as in this case, substitutes for compensation for services performed, then the era of evasion is already upon us. I find it difficult to believe that Congress envisioned that the bargaining parties could agree to substitute non-discretionary, collectively bargained bonuses in lieu of wages and thereby decrease

the amount of overtime that must be paid to the workers. I would instead affirm the judgment of the district court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
E.D. PENNSYLVANIA

Civ. A. No. 86-3862

BALTAZOR LOPEZ, *et al.*

v.

ART KRAFT CONTAINERS, CORP., *et al.*

May 20, 1987

MEMORANDUM AND OPINION

KATZ, District Judge.

In this case of first impression, I determine that "up front" bonus payments under collective bargaining agreements are part of the base to calculate overtime even though the union and the employers agreed that there would be no "roll up" of the lump sum payments. The issue is whether the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (the FLSA) obligates defendant employers to include lump sum payments in the regular hourly rate of compensation for the purpose of calculating overtime pay. The FLSA requires that an employee who works more than forty hours per week be paid an overtime rate of "one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(2). The "regular rate" at which an employee is paid is definied as "all remuneration for employment paid to, or on behalf of,

the employee." 29 U.S.C. § 207(e). The statute specifically excludes from the "regular rate":

> payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in furtherance of his employer's interest and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment.

29 U.S.C. § 207(e)(2). Defendants contend the lump sum payment is included within this statutory exception; plaintiffs contend that it is not.

Further issues to be resolved, if liability is established, are the method by which damages are to be calculated, and whether liquidated damages are to be awarded to plaintiffs under 29 U.S.C. §§ 216 and 260.

FINDINGS OF FACT

1. The United Paper Workers International Union Local 375 (the "Union") represents each of the plaintiffs in this action in collective bargaining. Each of the defendants maintains a collective bargaining agreement with the Union which covers employees engaged in the production of corrugated paper products.

2. Defendants Chesapeake Corrugated Container Company, Owens-Illinois, Inc., Stone Container Corporation (East Plant) and Willamette Industries negotiated collectively as members of the Philadelphia Container Association (the "Container Association"). From May 1984 through July 13, 1984, the Container Association negotiated with the Union.

3. Stone Container Corporation (West Plant) is essentially the same corporate entity as Stone Container

Corporation (East Plant). Stone West was acquired from another company in 1983, however, and was covered by a different collective bargaining agreement. Stone West negotiated a new agreement with the Union in August, 1984 which incorporated the same economic terms as were in the Container Association contract. Two of the principal negotiators for Stone West had been principal negotiators in the Container Association negotiations.

4. Defendant Art Kraft, prior to 1981, was a member of the Container Association. Art Kraft's 1981-1984 collective bargaining agreement expired before that of the Container Association; a new agrement was negotiated effective April 1, 1984.

5. Prior to 1984, the negotiated contracts had provided for annual increases in hourly wages and in other benefits paid to or on behalf of employees. In the 1984 negotiations the Defendant employers sought new contracts with no increases in the base hourly wage rates and decreased medical benefits.[1] These changes were designed to make employers more competitive with other corrugating companies which were paying lower wage rates.

6. The collective bargaining agreement negotiated between the Container Association and Local 375 called for, at Article 5, a first year bonus of $750.00 payable as of July 1, 1984, and a second year bonus of $500.00 payable as of July 1, 1985. (JointExhibit 1). To receive the first year bonus, employees of the Container Association employers had to have been active employees for three months prior to the date of the bonus; to receive the second year bonus, they had to have been active employees for six months prior to the date of the bonus. If Container Association employees who were on lay-off or long term disability returned to active employment

[1] The costs of providing medical insurance had escalated from 1981 to 1984.

within twelve months following the payment of the bonus, they could receive a pro rata share of the two bonuses.

7. The 1984 labor agreement negotiated between Stone West and Local 375 contained bonus and bonus eligibility provisions substantially identical to those of the Container Association contract. (Joint Exhibit 2). The bonus amounts were identical, and the eligibility language, found in the memorandum of agreement, (Joint Exhibit 5) tracks the Container Association language; all parties have interpreted the language as embodying the same eligibility requirements.

8. The remaining defendant, Art Kraft, negotiated with Local 315 for the payment of a first year $500.00 bonus payable to all employees active on the date of the bonus payment, and payable on a pro rata basis to employees on lay-off or long term disability who returned within one year of the date the bonus was paid. (Joint Exhibit 6, Article 5).

9. The lump sum bonuses were negotiated in lieu of first and second year wage increases. Both employer and Union representatives, during the negotiations, discussed the bonuses and recorded such discussions under the subject of wages. Bonuses are also treated under the subject of wages in the contracts themselves, the memoranda of understanding, and the employer negotiating notes. Changes in bonus amounts during the course of negotiations were made in response to, or in conjunction with, proposals relating to cents-per-hour increases. In discussions between parties across the table, bonus amounts were translated into cents-per-hour; the employer's negotiating notes show the same calculations made in employer caucuses and minutes.

10. The lump sum payments were also inducements by the employer to secure the employees' ratification of the contract in the face of minimal wage increases and reductions in medical benefits. Every aspect of a labor

agreement is intended to induce ratification and achieve labor peace. To state the obvious—ratification is desirable to create the conditions under which employees will work and defendants can manufacture. Thus, an inducement to ratify is an inducement for future services.

11. The parties agreed during the Union negotiations that there was to be no "roll-up" effect of the lump-sum payments, *i.e.*, there was to be no effect on the base hourly rate in calculating holiday pay, worker's compensation premiums, FICA, FUTA, and overtime. The union negotiators did not consider the implications of the FLSA for the treatment of the lump-sum payments for calculating of overtime. The FLSA issue was never discussed or considered in the negotiations.

CONCLUSIONS OF LAW

Jurisdiction over claims to recover unpaid overtime payments pursuant to the Fair Labor Standards Act, 29 U.S.C. § 207(a), is found under 29 U.S.C. § 216(b), which provides a private right of action to employees to recover unpaid overtime compensation, along with liquidated damages and attorneys' fees.

I. *Liability*

Under the FLSA, employees are entitled to overtime compensation, at the rate of one and one-half times the regular rate, for time worked in excess of forty hours per week. Section 207(e) of the FLSA requires inclusion of all remuneration for employment paid to, or on behalf of, the employee, in the regular rate, with the exception of seven listed types of payment.

FLSA rights may not be bargained away by union representatives. *Walling v. Harnischfeger Corp.*, 325 U.S. 427, 432, 65 S.Ct. 1246, 1249, 89 L.Ed. 1711 (1945) (negotiated bonus that is includable pursuant to the FLSA must "automatically enter into computation of the regular rate

for the purposes of § 7(a) regardless of any contract provision to the contrary"). Additionally, exceptions from the FLSA are to be narrowly construed against the employer. *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290, 79 S.Ct. 756, 3 L.Ed.2d 815 (1959); *Guthrie v. Lady Jane Collieries, Inc.*, 722 F.2d 1141, 1143 (3d Cir.1983). The burden of proof is on the employer to establish an exemption. *See Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190, 86 S.Ct. 737, 15 L.Ed.2d 694, *reh'g denied*, 383 U.S. 963, 86 S.Ct. 1219, 16 L.Ed.2d 305 (1966); *Guthrie, supra* at 1143.

The employers in this action rely on 29 U.S.C. § 207(e)(2), which permits the exclusion from the regular rate for:

> payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; *and other similar payments to an employee which are not made as compensation for his hours of employment.* (emphasis added).

The question of whether lump sum payments are to be exempt from inclusion in the regular rate of pay for overtime purposes is one of first impression; thus, the answer will depend primarily on statutory construction.[2]

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[2] The Department of Labor Opinion letters on this question are not dispositive. They essentially provide that:

> Because there is so much variation in the form of these bonuses, and because the employees involved are collectively represented, it is our view that, as a general matter, this is an area in which compliance with the provisions of the Act is best left to the parties to achieve, through litigation or otherwise.

Department of Labor, Opinion Letter of April 21, 1986.

Plaintiffs and defendants both focus their arguments on the italicized "other similar payments . . . not made as compensation for [] hours of employment." Plaintiffs contend the lump sum bonuses are compensation for hours of employment; defendants contend they are not. Based on the statute, two questions must be addressed: are the payments not made as compensation for hours of employments, and are they similar in character to payments in the section of the statute? Regarding the first question, the lump sum payment's character as compensation for employment supports including them in the employee's regular rate of employment. The evidence supports the finding that the payments were made in lieu of wage increases. While not tied directly to hours worked, the correlation in the eligibility provisions between work and bonus receipt supports the conclusion that the bonuses were compensation for employment. Employees who were not active—on long term disability or laid off—during the three months prior to the first year bonus date would not receive the full bonus; for the second year bonus, employees had to be active for the six months prior to the bonus date to receive the full bonus. If non-active employees returned to active employment within twelve months of the bonus date, they would receive a pro rata share of the bonus applicable to that year.

Regarding the similarity of the payments, the regulations, in construing the "other similar payments" clause states:

> Since a variety of miscellaneous payments are paid by an employer to an employee under peculiar circumstances, it was not considered feasible to attempt to list them. They must, however, be "similar" in character to the payments specifically described in section 7(e)(2). It is clear that the sum was not intended to permit the exclusion from the regular rate of payments such as bonuses or the furnishing of facilities like board and lodging which, though not

> directly attributable to any particular hours of work are, nevertheless, clearly understood to be compensation for services.

29 C.F.R. § 778.224 (1986). According to the regulation, the lump sum payment, to be included in this exception, must be "similar" in character to the payments specifically described in section 7(e)(2). This section includes two categories of payments. The first is payments for certain idle hours, when payments are "in the amounts approximately equivalent to the employee's normal earnings for a similar period of time, . . . not made as compensation for his hours of employment." *See* 29 C.F.R. § 778.218 (a). The lump sum payments are not similar in character to these payments.[3] The second category of exemption is for payments made for the employer's reimbursement of an employee for expenses an employee incurs "on his employer's behalf or where he is required to expend sums solely by reason of action taken for the convenience of his employer." 29 C.F.R. § 778.217. Nor do the lump sum payments share the characteristcis of this category.

This regulation specifically provides that the "other similar payments" clause was not intended to exclude bonuses from the regular rate of payment. The lump sum payments can be best characterized as [non-discretionary] bonuses.[4]

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[3] *See also* 29 C.F.R. § 778.218(d) (describing "other similar cause" as including "only absences of a nonroutine character which are infrequent or sporadic or unpredictable").

[4] The Random House Dictionary defines "bonus" as: "1. something given or paid over and above what is due. 2. a sum of money granted or given to an employee, . . ., over and above his regular pay, usually in appreciation for work done, length of service, accumulated favors, or the like . . . ." Random House College Dictionary 154 (revised ed. 1982). Plaintiffs' briefs refer to the sum as "contractual bonuses." Plaintiffs' Pre-Trial Memorandum of Law at 1. The defendants' brief refers to the sum both as "lump sum payments," and as "lump-sum bonuses." Defendants' Post-Trial Memorandum of Law at 1, 7. The defendants seek to charac-

For bonuses to be excluded from the regular rate of pay, they must qualify for exclusion under § 207(e)(3) of the statute which requires that "both the fact that payment [be] determined *at the sole discretion* of the employer at or near the end of the period and *not pursuant to any prior contract*, agreement, or promise causing the employee to expect such payments regularly." 29 U.S.C. § 207(e)(3) (emphasis added). Since the lump sum payments at issue in this case are non-discretionary, and are given pursuant to a contract, they do not qualify for exclusion under §(e)(3). The fact that Congress chose to deal with excludable bonuses explicitly in §(e)(3) implies that Congress did not intend those bonuses that do fall within that exclusion to be excludable.

Conclusion

Based upon the interpretation of the relevant statute, and the characteristics of the lump sum payments as compensation for hours worked, these sums are to be included in the employee's regular rate of pay for purposes of statutory calculation.

II. *Liquidated Damages*

Plaintiffs have requested an award of liquidated damages. In 1947, Congress amended, the then mandatory award of liquidated damages for violations of the Fair Labor Standards Act (29 U.S.C. § 216(b)) to provide that:

> [I]f the employer shows to the satisfaction of the court that the act or omission giving rise to [an action under §§ 206 or 207 of the FLSA] was in good

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terize the lump sum payments "as an inducement to secure ratification of contracts." This characterization is consistent with the dictionary's example of a bonus: "Every purchaser of a pound of coffee received a box of cookies as a bonus." *Id.* The box of cookies can be viewed as an inducement to purchase the coffee, as the lump sum payments can be viewed as an inducement to ratify the contract.

> faith and that he had reasonable grounds for believing that his act or omission was not in violation of the Fair Labor Standards Act of 1938 as amended, the court may, in its own discretion, award no liquidated damages or award an amount thereof not to exceed the amount specified in § 216 of this title.

Before the District Court's can invoke its discretion not to award liquidated damages, the employer has the " 'plain and substantial burden of persuading the court by proof that his failure to obey the statute was both in good faith and predicated upon such reasonable grounds that it would be unfair to impose upon him more than a compensatory verdict.' " *Marshall v. Brunner*, 668 F.2d 748, 753 (3d Cir.1982), *quoting Rothman v. Publicker Industries*, 201 F.2d 618, 620 (d Cir.1953). To meet its burden, the employer must affirmatively establish a subjective defense—that he acted in good faith by attempting to ascertain the Act's requirements, *Williams v. Tri-County Growers, Inc.*, 747 F.2d 121, 129 (3d Cir.1984), and an objective defense —that there were reasonable grounds for believing the employer was in compliance with the Act. *Marshall, supra* at 753.

The employers have met both the good faith requirement that they "ha[d] an honest intention to ascertain and follow the dictates of the Act," *Williams, supra* at 129, as well as the objective reasonableness requirement. During the contract negotiations, the attorneys and negotiators on both sides understood that contractually, the lump-sum payments were not to be included in the base rate of pay for the purpose of calculating overtime pay. The employers in the labor negotiations were represented by experienced labor counsel upon whom the employers relied to provide advice on legal obligations.

The Union's FLSA question first raised in September, 1984, posed a unique question of statutory interpretation. Each of the employers made an honest attempt to ascertain and follow the dictates of the FLSA by contacting

their counsel and requesting advice. Counsels O'Reilly and Stern reviewed the statute and the regulations. Mr. O'Reilly reviewed Department of Labor opinion letters, and contacted the Department of Labor informally to confirm his own interpretation of the Act. The attorneys were aware that other employers had made hundreds of similar lump sum payments without including them in the regular rate for the purpose of calculating overtime. The two counsels discussed the issue, and concluded that the Union's interpretation of the FLSA was legally incorrect.

Both counsel responded to Mr. Hasenauer, stating that the Union's interpretation of the FLSA was incorrect, and that the employers could not include the lump-sum payments in the regular rate for the purposes of calculating overtime.[5]

I find that the above evidence demonstrates that the employer was acting in good faith, and had a reasonable basis for interpreting the FLSA as not requiring the lump sum payments to be included in the rate of pay for calculating overtime. I will thus exercise my discretion not to award liquidated damages.

III. *Damage Calculation*

When it is not possible to identify a bonus with a particular work week, the regulations direct me to adopt a reasonable and equitable method of allocation.[6] I find the

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[5] Neither Mr. Hasenauer nor any other employee or Union representative revived the issue or sought clarification of the employers' positions during the 22 months between Mr. Hasenauer's inquiry and this action's commencement.

[6] The FLSA does not specify what this method should be. The Department of Labor, in 29 C.F.R. § 778.207 describes a method of calculation appropriate for bonuses that cannot be identified with particular work weeks, as follows:

> (b) *Allocation of bonuses where bonus earnings cannot be identified with particular work weeks.* If it is impossible to allocate the bonus among the work weeks of the period in pro-

following to be a reasonable and equitable method to use to calculate the lump sum payments into the regular rate for purposes of overtime: The bonus amount should be allocated to the twelve months following the date of each bonus payment, based on the finding that the bonuses were negotiated in lieu of wage increases. The bonus amount should then be divided first by the number of weeks in the twelve month period (52) and then by forty (the number of hours above which statutory overtime is to be paid). The resulting average hourly increase should be multiplied by .5, (based on the statutory overtime of time and a half) and then multiplied by the number of statutory overtime hours (hours in excess of 40) worked in each work week by the employee to produce the damages calculation for that particular week. This method of calculating damages is consistent with the interpretation of the lump sum payment as compensation for hours worked.

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portion to the amount of the bonus actually earned each week, some other reasonable and equitable method of allocation must be adopted. For example, it may be reasonable and equitable to assume that the employees earned an equal amount of bonus each week of the period to which the bonus relates, and if the facts support this assumption additional compensation for each overtime week of the period may be computed and paid in an amount equal to one half of the average hourly increase in pay resulting from bonus allocated to the week, multiplied by the number of statutory overtime hours worked in that week. Or, if there are facts which make it inappropriate to assume equal bonus earnings for each work week, it may be reasonable and equitable to assume that the employee earned an equal amount of bonus each hour for the pay period and the resultant hourly increase may be determined by dividing the total hours by the number of hours worked by the employee during the period for which it is paid. The additional compensation due for the overtime work weeks in the period may then be computed by multiplying the total number of statutory overtime hours worked in each such work week during the period by one-half this hour increase.

ORDER

AND NOW, this 20th day of May, 1987, it is hereby ordered that, there being no just reason for delay, judgment as to liability is entered in accordance with the attached memorandum, in favor of plaintiffs and against defendants determining that the lump sum payments at issue are to be included in the regular rate of pay for the purpose of calculating overtime pay; and in favor of defendants and against plaintiffs of plaintiffs' claim for liquidated damages. U.S. Magistrate Edwin E. Naythons is designated to serve as a master, pursuant to Title 28 U.S.C. § 636(b)(2), and Rule 53, to make the difficult computation of damages, in accordance with the attached memorandum, after receiving evidence and holding such hearings as are necessary. The Master shall prepare and file a report with his findings of fact and conclusions of law in accordance with Rule 53(e).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1348

MINIZZA, ANTHONY, *et al.*,
Appellees

v.

STONE CONTAINER CORP.
CORRUGATED CONTAINER DIV.
EAST PLANT,
CHESAPEAKE CORRUGATED CO.,
OWENS-ILLINOIS, INC.,
STONE CONTAINER CORP. WEST PLANT,
STONE CONTAINER CORP. EAST PLANT,
Appellants

SUR PETITION FOR REHEARING

BEFORE: GIBBONS, *Chief Judge*, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, and COWEN, *Circuit Judges*

The petition for rehearing filed by appellees in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the

decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Robert E. Cowen
Circuit Judge

Dated: Apr. 26, 1988

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A88-50

ANTHONY MINIZZA, *et al.*,
Applicants

v.

STONE CONTAINER CORP.
CORRUGATED DIV. EAST PLANT, *et al.*

ORDER

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including August 24, 1988.

/s/ Byron R. White
Associate Justice of the Supreme
Court of the United States

Dated this 20th day of July, 1988.

APPENDIX E

The following employees of the Stone Container Corporation, listed by the Division by which they are employed, were plaintiffs in the district court and are petitioners in this Court.

CHESAPEAKE CORRUGATED SHIPPING CONTAINER DIVISION

Michael Amoros, Jr.
John J. Aleman
Robert W. Brabazon
Donald Brady
Nick Buccirelli
Richard Biega
Edward Cisek, Jr.
Charles Dunn
Peter DiGregorio
Michael Dunahue
Charles F. Dorland
Edward B. Fox
Joe Fudala
Alice Flower
Robert Fisher
William J. Fithian
Stefan Fediuk
Francis Grabowski
Chester Gumienny
Rudolph Griffin
Al Griffin
Martin J. Grassinger
Donald Harr
Ronald Howe
Duoe Van Ha
Lawrence Iezzi
Joseph R. Jehinski
Charles J. Klimas
Charles E. Knight
Helen Kazlauakas
Gary Krause
Alfred Lambert
Henrietta J. Leonowicz
Carmelo Melindez
Jorge Mills
Stanley Mieloch
John McKeown
Joaquin Mora
John Motchos, Jr.
Kenneth J. McDonald
Harry McLoud
Edward McGurk
Larry McCloud
Frank McElroy
Michael McDevitt
Robert Marshall
Charles Nelson
Angela Niziolek
Craig Nola
Bob Nachbar
John Opiola
Thomas Orr
Gabrial Ortiz
Michael Peters
Scott Palek
Theodore Rdesinski

Bruce R. Ryan
Daniel Rios
Joseph J. Randzo
William J. Ryan, III
J.E. Simpson
Edward Szymkowski
Antonio Sierra
Mildred Short
Gerald Savage
Luis Sanchez
James Sampson
Raymond Taite
Morris Tabolsky
Thomas Torrance
Richard Trunkwalter
Jose Vega
Jeffrey Vance
Robert C. Wertherill
Joseph Walsh
Anna Zgoda
John J. Zornek

OWENS-ILLINOIS, INC.
FOREST PRODUCTS DIVISION

Anthony Andreotti
Craig Alcantara
David R. Ashford, Sr.
Arnold Atkinson
Joseph Atkinson
John Atkinson, Jr.
John Atkinson
Robert Bender
Russell Buchanan
Colie Bayter, III
Marvel Berdelip
Robert Bruck
Hector Berdecia
Curtis Brown
Eugene Bryant
Nathaniel Bolden
Ed Beerhalter
Cliff Clark
Robert M. Crouch, Jr.
Hector A. Huevas, Jr.
Presley J. Carney
Elliott Cooper
Harry Dulton, Jr.
Mack DeBois, Jr.
Albert Danner
Leonard Davis
Paul R. Edwards
David Field
John Gosselin
Gloria Grange
James P. Gill
William Hess
Robert Hansbury
James Holden
Andrew Helfer
Norman Handy
Joe Hardy
Edward F. Holley
David Hess
Joseaphus Jones
Avant Jones
Thelmo R. Jarvis
Edward Jones
Herbert Johnson
Edward J. Klaiss
Elliot Lopez
Nick Lomma
Kevin B. Leonard
Nelson Lopez
Anna K. Lotz
Grady Y. Love
Spencer Love
James Murray
George H. McClillan
Charles McCoray
Biennenido Montero
Robert Marquis
John McMahan
Stephen McKay
Gerald Mann
William Manera
Eugenio Martinez
Leslie McClellan
Wilmer H. Mills, Jr.
Timothy E. McHugh
Walter Mack
Porter McDaniels
Jerry Newkirk
James S. Newell
William Norman

Rodney Ourns
Anthony Pera
James E. Page
Cindy Peto
Thomas Quarry
Charles Riddick
Spam W. Ross
Curtis Robinson
Salvatore Stabeno
Frances Shea
Anthony Stanya
Joseph J. Smith
Harry Solomon
Joseph F. Szogi
Margaret Sailor
Andrew Shelley
James E. Sperling
Gerald Szczepanski
Robert Stabeive
Donald J. Tosh, Jr.
Robert Thomas
James H. Thomas
Roman Vlassenko
Angel Velazanez
Leroy Williams
Robert D. Wheeler
Reuben Williams
Gary Werkhersi
David Williams
Zannie Williams
Joseph Weist
Jose Zaragoza
Robert Zefferi
Paul Zazula
Stephen Zinelli

STONE CONTAINER CORPORATION CORRUGATED CONTAINER DIVISION, WEST PLANT

Clifford Bell
James Bell
Joseph Bluford, Jr.
Frank Brennan
Michael Bruno
Arnold F. Bryant
James E. Bryant
Ladislaus Bodor
Ferdinand Cavaliere
Ralph Cavaliere
Stephen Cifelli
Paul Ciprianni
William Creevey
Louis Fareri
Morris Geter
Robert Gift, Sr.
Dennis Gorski
George Grauvickel
William Hall
Robert Hennessy
Charles Himes
Denis Holmes
Michael D. Jones
Jacob A. Karley
Randy Kilgore
Tomas J. Killian
George J. Kleiner
Thomas McCall
Timothy P. McKeon
James McKinney
June Mezicco
Frank Miller
Joseph P. Mirabelli
Thomas Moran
John Oler
Stephen Passio
Thomas Patterson
Richard J. Rink
George Robinson
Israel Rosa
John Rynkiewicz
Benjamin Square
Richard Stahl
William Stahl
Charles Tanner
Frank Tomcauage
James Toohey
Josephine M. Umidi
Raymond Velez
Michael Vetrolli
Mark A. Waggle
Edward Washney
John M. Weaver
Howard White
Roger Williams

STONE EAST

Burcia Wendell Aldridge
Michael K. Ahern
Robert Armstrong
Emilio A. Alberty
Charles Baker
Thomas J. Brisendine
Robert Balasa
Thomas A. Blogus
Enwnn Burn
Benny Baver
Harry A. Barly
Kenneth Foster
Pedro J. Graulou
Peter Sanchez
Porfirio Gonzalez
Francis Greipp
Joseph V. Gaufob
Anthony J. Gehring
Robert Gremmel
Harry Hones
J. Henney
Kenneth M. Horan
Joseph Jastrzebski
John McCarron
Paul McFay
Stephen J. Mackey
William Minnich
David C. Murray
Hector R. Medina
David C. McCauce
Ralph Marino
James R. McKelvey
Pascual Martinez
Anthony Munizza
Robert Morrison
Joseph F. Maguire
John W. Moss, Jr.
Thomas J. Mullen
John Nolan
Daniel Odom
John T. Plichter
Donald Poserina
Thomas Pomager
Francis Powals
Walter M. Pocan
Angelo J. Pucci
Alfred DeRosier
Joseph Rodgers
Chalie Redmond
Frank W. Reis
Alexander Rasiul
Olvin Rodriguez
Randolph Rankins
Wilson Roberts
Jack N. Steed
Salvatore Salfi
Geraldine Simpson
Wilber M. Segura
James Smalls, Jr.
James Turner
Michael Turco
Steven Utz
Henry Wylupek
Christopher J. Warner
John R. Watkins
William V. White
William L. Kelly
Anlm Kuzyek
William Keck
F. Keifaber, Jr.
William Leiter
Al Labinus

Stephen Lees
David Liles
Raymond Minnes
Daniel Madden
M.H. Marshall
Thaddeus F. Mank
Bruce E. Mitchell
Robert Bochmer
Frank Cader
Robert Czerniak
Thomas J. Clements
Francis R. Carr
James Connelly
John J. Christopher
Eugene Chopma
Frank Dixon
Joseph Devlin
Charles H. Donat
Bob Donnelly
Joh J. Daley
Kenneth Devlin
Benjamin Davidson
John Dittmar
Kenneth Danks
John Delaney
James M. Edwards
Kevin G. Eyna
Clarence Frazier
Thomas M. Fredrick
Gregory Fletcher
Edward Fitzgerald

APPENDIX F

STATUTORY PROVISIONS

29 U.S.C. § 207
MAXIMUM HOURS

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * *

(e) Definition of "regular rate" of employment

As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—

(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

(2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred

by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

(3) Sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Administrator set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Administrator) paid to performers, including announcers, on radio and television programs;

(4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) of this section or in

excess of the employee's normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days; or

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a) of this section,[3] where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek.

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SEP 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-346

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

ANTHONY MINIZZA, *et al.*,
Petitioners,

v.

STONE CONTAINER CORP. CORRUGATED CONTAINER DIV. EAST PLANT, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Did the Court of Appeals err in concluding as a matter of law that up-front lump sum payments made to employees to induce their ratification of a collective bargaining agreement were not compensation for hours of employment within the meaning of Section 7(e)(2) of the Fair Labor Standards Act, (the "FLSA"), 29 U.S.C. § 207(e)(2)?

(a) Was that holding a correct conclusion of law based on the District Court's factual findings and undisputed testimony about the purpose of the payments and the eligibility conditions attached thereto?

(b) Did the Court of Appeals err in adopting a statutory interpretation of § 7(e)(2) which was consistent with that previously rendered by the Department of Labor?

PARTIES TO THE PROCEEDING

The Respondents in this case are Stone Container Corporation, Corrugated Container Division (East Plant), a Division of Stone Container Corporation; Stone Container Corporation (West Plant); Chesapeake Corrugated Container Division, a Division of Chesapeake Corporation; and Owens-Illinois, Inc. There are no parent, subsidiary or affiliated corporations except as set forth herein.

Petitioners in this case, all individuals, are current or former employees of the Respondent employers.

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No. 88-346

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

ANTHONY MINIZZA, *et al.*,

Petitioners,

v.

STONE CONTAINER CORP. CORRUGATED CONTAINER DIV. EAST PLANT, *et al.*,

Respondents.

COUNTERSTATEMENT OF THE CASE

Respondents (referred to hereafter as the "employers") adopt the introduction and fact sections of the decision of the Court of Appeals, which are reprinted in the Appendix filed by Petitioners at 3a-6a.[1] Set forth below is a brief Counterstatement of the Case which addresses certain inaccuracies in, and omissions from, the Statement of the Case advanced by petitioners (referred to hereafter as "plaintiffs").

In their Statement of the Case, plaintiffs describe the lump sum payments and eligibility conditions without discussing the purpose of the eligibility conditions. Plaintiffs note correctly that the lump sum payments were adopted in lieu of wage increases, for the purpose

1. References to "App." are to the Appendix filed with the Petition for a Writ of *Certiorari*. References to "JA" are to the Joint Appendix filed with the Court of Appeals.

of inducing ratification of the collective bargaining agreement. They fail to acknowledge, however, that there was no specific finding by the District Court that the payments were given in exchange for services actually rendered. The District Court's conclusion that the payments were compensation for employment was stated in the Conclusions of Law, rather than the Findings of Fact. (App. at 27a-31a). In rejecting that legal conclusion, the Court of Appeals did not disturb the District Court's Findings of Fact. Indeed, plaintiffs do not point to a single *factual* conclusion by the District Court which was disregarded or rejected by the Court of Appeals.

The Court of Appeals pointed to undisputed testimony from the trial record that the eligibility conditions underlying the lump sum payments were intended simply as a cost-saving device. The United Paperworkers International Union Local 375 ("the Union") originally wanted lump sum payments to be made to all employees on the seniority list, without regard to length of service. The employers recognized however, that they could obtain the ratification of the collective bargaining agreement without making payments to so many individuals. In targeting the lump sum payments to active employees with minimum periods of service, the employers were not rewarding services rendered under the expired collective bargaining agreements. On the contrary, they agreed to make payments to those individuals who were perceived as most likely to participate in the ratification process, and who might otherwise be inclined to vote against the contracts. (App. at 12a; JA at 511-14).

SUMMARY OF REASONS FOR DENIAL OF WRIT

Plaintiffs ask this Court to rule *per se* that lump sum payments made to induce ratification of a collective bargaining agreement must be included in the "regular rate" of compensation in calculating overtime pay under the FLSA. Plaintiffs' argument is presented in a case of first impression. Thus, plaintiffs do not even suggest that a writ of *certiorari* would be appropriate under Rule 17.1(a) of the Supreme Court Rules of Procedure, which provides for review of a decision in clear conflict with that of another federal appellate court. Presumably, therefore, review is sought under Rule 17.1(c), on the ground that the case presents an important question of federal law which has not been, but should be, settled by this Court.

The instant case is inappropriate for *certiorari* jurisdiction for two reasons. First, the Court of Appeals correctly interpreted the FLSA based on the factual findings and records developed by the District Court. Section 7(e)(2) of the FLSA clearly permitted the defendant employers to exclude the lump sum payments from the regular rate of compensation in calculating overtime pay, at least in the specific factual context presented at trial.

Second, while the Court of Appeals reversed a sweeping and erroneous legal conclusion by the District Court, its holding was specifically limited to "the facts of the particular case." (App. at 14a). As the Department of Labor has recognized, "there is so much variation in the form of these bonuses" that compliance with the FLSA is better achieved through litigation, rather than a hasty or overbroad interpretation of the statutory provision at issue. Until other District and Circuit Courts address the issue in its varied contexts, a request for review by this Court is premature.

REASONS FOR DENIAL OF WRIT

A. Certiorari Should Be Denied Because The Decision Of The Court Of Appeals Below Was Plainly Correct As A Matter Of Law.

The FLSA requires that an employee who works more than forty hours in one week be paid an overtime rate of not less than "one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(2). The "regular rate" at which an employee is paid is defined in § 7(e) of the FLSA as "all remuneration for employment paid to, or on behalf of, the employee." The "regular rate" is defined specifically to exclude seven categories of payments, including gifts, vacation and holiday pay, contributions to health and welfare plans, discretionary bonuses and premium pay for excess hours worked. Among the statutory exclusions from the "regular rate" are:

> [P]ayments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee *which are not made as compensation for his hours of employment*.

29 U.S.C. § 207(e)(2) (emphasis added).

The payments at issue in this case were not "compensation for hours of employment" within the plain meaning of § 7(e)(2). Significantly, the bonuses were paid at the beginning of the contract years in question. An employee who received a lump sum payment was not required to work even one more day. An employee who quit, retired, was terminated or went on sick leave the day after a lump sum payment was made was under no

obligation whatsoever to refund all or even part of the payment. (JA 442, 531). The payment was his to keep, a reward for his having been a member of a bargaining unit that ratified a contract providing for wage freezes and benefit concessions.

Likewise, the lump sum payments were not compensation for past hours of employment. (JA 444). Indeed, it would be absurd to suggest that the employers agreed to new contracts which provided for compensation for services rendered by employees under the old, expired contracts. In fact, an employee who quit the day before the lump sum payments were made was entitled to no part of the bonus. (JA 442-44).

Plaintiffs' challenge to this analysis is fourfold. First, plaintiffs argue that the lump sum payments were compensation for services rendered, as evidenced by eligibility conditions attached to the payment of the bonuses. Second, they argue that the Court of Appeals erroneously required a link between lump sum payments and specific numbers of hours of service as a precondition to the inclusion of the payments in the "regular rate" of compensation. Third, in arguing for a *per se* rule that has been rejected already by the Department of Labor, plaintiffs point to a purported dissimilarity between collectively-bargained lump sum payments and the examples of excludable compensation set forth in § 7(e)(2) of the FLSA. Finally, plaintiffs look to public policy considerations. Each of these arguments advanced by plaintiffs is erroneous.

1. The Lump Sum Payments Were Not Compensation For Services Rendered.

The District Court concluded, and the Court of Appeals agreed, that the lump sum payments were negotiated in lieu of wage increases to induce the ratification of a collective bargaining agreement. (App. at 5a, 26a). Plaintiffs argue that because the lump sum

payments were made in lieu of wage increases, they must be treated similarly to future wages in calculating overtime pay. Simultaneously, they point to the eligibility conditions in suggesting that lump sum payments were linked to past service.

These contentions are inconsistent. On the one hand, plaintiffs analogize the payments to wages, which are payments for *future* services rendered. On the other hand, they point to eligibility conditions based on *past* services rendered. Plaintiffs fail to recognize this anomaly.

The logical explanation is that the payments were neither compensation for past services nor compensation for future services. The up-front, lump sum payments were fundamentally different from wages.[2] Collectively-bargained agreements to pay wages are intended not only to secure ratification of a contract, but to compensate an employee for each hour or unit of time worked. The *quid pro quo* is wages for services rendered.

The lump sum payments in the instant case, by contrast, were not rewards for services rendered, but benefits paid to members of a bargaining unit which voted to approve the contract. The employers could have provided any number of benefits to achieve that purpose, including additional vacation time or pay, pension contributions, health and welfare benefits or profit sharing plans. Instead, they agreed to pay cash. The *form* of the benefit provided did not transform the benefit into compensation for hours of employment.

---

2. The up-front, lump sum payments at issue in this case also differ from bonuses paid at the *end* of a stated period as compensation for services performed. Such end-of-year bonuses are clearly compensation for hours of employment, as recognized by the Department of Labor in its regulations, 29 C.F.R. § 778.209(b) (1987). The lump sum payments, by contrast, were made at the beginning of the years in question, without any requirement of future service.

Plaintiffs misconstrue the nature of the holding below in arguing that the Court of Appeals reversed a finding of fact in concluding that the lump sum payments in this case were not compensation for employment. The District Court, focusing in part on the eligibility conditions, stated in its Conclusions of Law that:

> While not tied directly to hours worked, the correlation in the eligibility provisions between work and bonus receipt supports the conclusion that the bonuses were compensation for employment. Employees who were not active — on long term disability or laid off — during the three months prior to the first year bonus date would not receive the full bonus; for the second year bonus, employees had to be active for the six months prior to the bonus date to receive the full bonus. If non-active employees returned to active employment within twelve months of the bonus date, they would receive a pro rata share of the bonus applicable to that year.

(App. at 29a). Thus, the District Court rendered a legal conclusion that the payments were compensation for employment.

In reversing that legal conclusion, the Court of Appeals did not disturb the District Court's Findings of Fact. Instead, it reached a different conclusion of law based on the District Court's factual findings and the record on appeal. The Court of Appeals concluded that:

> [T]he fact that the entitlement to these payments was dependent on an employee's having been with the employer for a certain period of time preceding the payment *does not support the conclusion that the payments were compensation for employment*. A review of the eligibility terms reflects a requirement only that a payee achieve the status of an active employee for a specified period of time prior to receipt. It does not matter how many hours an

> employee worked during that period, nor how many hours he might work in the future. The employee could even terminate his employment immediately upon receiving the payment and retain the payment.
>
> Furthermore, *the undisputed testimony reflects that the eligibility requirements were included solely to hold down the employer's costs.* [JA at 510-11]. As the employers note, all the employees could have been made eligible for the bonus. However, this alternative would have cost the employers more than if they were able to exclude some of the employees, as the employers chose to do. Ironically, if the employers had paid the lump sum to all employees there could be no argument that the eligibility conditions were tied to compensation for hours of employment as there then would be requirements. In that case, the attention would be focused solely on the character of the payments, which we believe to be the key inquiry in this case. . . . *We see no reason why we should come to a different conclusion where the evidence reflects that requirements were imposed solely for reasons of cost containment, and were not an attempt to tie payments to compensation for services rendered.*

(App. at 9a) (emphasis added). The Court of Appeals applied the law to the facts, without altering a single factual finding of the District Court. Indeed, the question of whether the lump sum payments were compensation for hours of employment was the ultimate legal issue in this case.

2. The Court Of Appeals Did Not Require A Precise Calibration Or Link Between Specific Hours Of Service And The Amount Of The Lump Sum Payment.

In holding that the lump sum payments in this case were properly excluded from the regular rate of compensation, the Court of Appeals concluded that they were

"not payments relating to hours of employment or service." (App. at 12a). The precise statutory language of § 7(e)(2) excludes from the regular rate of compensation "other similar payments to an employee . . . not made as compensation for his hours of employment."

According to plaintiffs, the Court of Appeals misread § 7(e)(2). Plaintiffs argue that:

> As read by the court of appeals . . . § 7(e)(2) exempts from the "regular rate" for overtime purposes any payments made by an employer to an employee not measured by a *precise* number of hours or amount of service.

(Cert. Petition at 11) (emphasis in original).

That characterization of the Court of Appeals' decision is erroneous. The Court did not base its decision on the absence of a calibration or formula. Instead, it recognized that the statute required *some nexus* between services and compensation paid, and that there was no such link whatsoever in this case. That holding is consistent with the statutory language, which speaks of compensation for *hours* of employment. That does not mean that the hours must be quantifiable in direct relation to the payment; it means simply that there must be *some* hours worked or services performed as a *quid pro quo* for the payment. In this case, there was no evidence whatsoever to establish that the lump sum payments were intended to be rewards for services rendered.[3]

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3. This is not the only example of employee compensation or remuneration which is attributable to employment status, rather than specific services performed. For example, a signing bonus may be paid to an employee at the commencement of employment, without any requirement of a refund if the employee quits shortly thereafter. Similarly, pension contributions, health and welfare benefits and other forms of compensation may be provided to employees on sick leave or layoff, even though no services are performed as a basis for the benefits. In those instances, (cont.)

3. The Exclusion Of The Lump Sum Payments Was Consistent With The "Other Similar Payments" Language In Section 7(e)(2).

Plaintiffs argue that the lump sum payments were not similar to the other forms of excludable compensation identified in § 7(e)(2). The pertinent statutory language permits the exclusion of

> payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and *other similar payments to an employee which are not made as compensation for his hours of employment . . .*

29 U.S.C. § 7(e)(2) (emphasis added). The Department of Labor's interpretive regulations state that such payments must be " 'similar' in character to the payments specifically described in section 7(e)(2)." 29 C.F.R. § 778.224(a) (1987).

In the context of pure statutory interpretation, the District Court concluded that the lump sum payments were not "similar" to payments for idle hours or reimbursements for expenses, which constitute the first two of the three enumerated categories in Section 7(e)(2). (App. at 30a). The Court of Appeals reversed, concluding that the payments were "similar in character" insofar as "they are not payments relating to hours of employment or service." (App. at 12a). The Court of Appeals added that such a conclusion was mandated by the plain statutory language of § 7(e)(2), which contains

---

(Continued)
payments are made in reward for employment status, not as compensation for services rendered.

three separate clauses, each of which must be read independently:

> The phrase "other similar payments . . . not made as compensation for hours of employment" does not mean just other payment for idle hours or reimbursements, the two types of payments set forth in the two preceding clauses of the section, but payments not tied to hours of compensation, of which payments for idle hours and reimbursements are only two examples. This interpretation gives independent meaning to the third clause. Indeed, it makes little sense to read the third clause as only an embellishment of the first two, since those two clauses contain "other similar" language as well.

(App. at 11a-12a) (footnote omitted).

The Court of Appeals' statutory interpretation is also supported by the Department of Labor's opinions on the issue. In an October 15, 1981 Opinion Letter (JA at 25-26), the Department of Labor concluded that up-front, lump sum payments which were collectively bargained in lieu of increases of wages were properly excluded from the regular rate of compensation under § 7(e)(2). Obviously, the Department of Labor did not consider the "other similar payments" language of § 7(e)(2) to be a bar to the exclusion of lump sum payments from the regular rate. Thus, while there may be a dispute as to how the Department of Labor would apply § 7(e)(2) to the facts of any particular case, there can be no dispute about the Department's position on the interpretation of the "other similar payments" language in the statute and the regulations.

This interpretation by the Department of Labor is entitled to "respect." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944):

> We consider that the rulings, interpretations and opinions of the [wage and hour] Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.

Id. Indeed, at issue here is not only the statute, but the administrative regulations interpreting § 7(e)(2).[4] As the Court held in *Udall v. Tallman*, 380 U.S. 1, 16 (1965), even greater deference is required "[w]hen the construction of an administrative regulation rather than a statute is in issue":

> Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt . . . [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.

Id. at 16-17 (quoting from *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945)). Plaintiffs, like the District Court below, fail to give proper deference to the Department of Labor's interpretation of its own regulations.

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4. Plaintiffs rely heavily on the Department of Labor's interpretation of the "other similar payments" provision in § 7(e)(2). Plaintiffs cite 29 C.F.R. § 778.224(a), which is cited and discussed above, arguing that this Court should recognize "[t]hese codified interpretative rulings of the Department of Labor." (Cert. Petition at 14). It is curious that plaintiffs cite the regulations without addressing the Department of Labor's 1981 Opinion Letter which, by implication, sheds considerable light on the regulation in question.

4. Public Policy Supports The Exclusion Of The Lump Sum Payments From The Regular Rate Of Compensation.

Plaintiffs point to the prevalence of lump sum payments in collective bargaining in recent years, arguing that public policy supports the inclusion of such payments in the regular rate of compensation when calculating overtime pay. The Court of Appeals disagreed, finding that public policy supported the opposite result. While limiting its holding to the facts of this case, the court noted that:

> The FLSA was not intended to emasculate the ability of labor and management to be creative in resolving labor disputes in a manner which is mutually beneficial from an economic standpoint to all parties involved in such negotiations. The FLSA should not be used in this case as an impediment to creative and innovative collective bargaining which brings labor peace.

(App. at 14a). That position is consistent with the evidence developed at trial, which showed that the Union and the employers agreed to the lump sum payments — with the understanding that such payments would not be included in the regular rate in calculating overtime pay — for the specific purpose of inducing the ratification of an overall labor package which otherwise would have been less attractive to employees. Such creativity and innovation achieved precisely the beneficial result described by the Court of Appeals.

Contrary to plaintiffs' arguments, there is no policy which mandates the inclusion of the lump sum payments in the regular rate of compensation. Lump sum payments are simply a form of benefit, like holiday pay,

vacation pay and other fringe benefits, all of which are expressly excluded from the regular rate under § 7(e)(2) of the FLSA.

Plaintiffs' predictions of draconian ramifications are illogical and unreasonable. Plaintiffs point to no evidence or statistics to support their bold assertion that "[t]he result would be to encourage employers to work employees longer hours; to limit the compensation employees receive for the inconveniences and wear and tear of overtime work; and to discourage, rather than encourage, the spreading of work among more employees." (Cert. Petition at 9). Certainly, the Department of Labor disagrees, as evidenced by its refusal to adopt a *per se* rule of the kind advocated by plaintiffs. (*See* DOL Opinion Letter dated April 21, 1986, JA at 34-36).

It is important to emphasize, moreover, that the use of lump sum payments to induce the ratification of a collective bargaining agreement is obviously favored by employers and unions throughout the country. Indeed, the popularity of lump sum payments among employees and unions may be attributable in part to a trade-off which results in a definite benefit for employees, and a potential detriment to employers. In foregoing a relatively modest adjustment to overtime pay, an employee who receives an up-front lump sum payment obtains a substantial cash benefit. Even if the employee fails to work another day, whether because of resignation, termination, layoff, illness, plant closing or any other reason, he may keep that payment. This scenario does not lend itself to any wholesale evisceration of the existing wage scale. Employers would undoubtedly be reluctant to engage in a substantial reclassification of compensation from wages to up-front, lump sum payments, in view of the risk that they might not get any services in exchange for the payments made.

Thus, there are strong incentives for unions and employers to limit lump sum payments to the extent necessary to induce ratification of a collective bargaining

agreement, without disrupting the economic status quo. The predictions and ruminations of plaintiffs, therefore, should not detract from the statutory analysis set forth by the Court of Appeals.

B. The Exercise Of Certiorari Jurisdiction In This Case Of First Impression Would Be Premature.

In view of the prevalence of lump sum payments in collective bargaining in recent years, the issue of FLSA treatment in calculating overtime pay is, admittedly, an important one. What was particularly troublesome about the District Court's opinion was not that it ruled against the employers in this relatively small case, but that it adopted a *per se* rule which purported to require the inclusion in the regular rate of *all* up-front lump sum payments made as a result of collective bargaining.

The Court of Appeals was more careful in its crafting of a holding that was limited to the facts of this case. By necessity, the decision turned in part on questions of statutory construction, such as an interpretation of the "other similar payments" language of § 7(e)(2). The decision was also based, however, on the specific language of the collective bargaining agreements as well as testimonial evidence about the bargaining history underlying the lump sum payments. From these facts, the Court of Appeals concluded that the lump sum payments were not compensation for hours of employment within the meaning of § 7(e)(2). The Court cautioned that:

> We do not address whether all such payments are or are not excludable; that finding depends on the facts of the particular case.

(App. at 14a).

The Department of Labor has similarly concluded that the FLSA treatment of up-front lump sum payments requires a fact-intensive analysis. In its April 21,

1986 Opinion Letter, as discussed above, the Department noted that because "there is so much variation in the form of these bonuses", disputes are better resolved through bargaining or litigation rather than through the adoption of a universal rule. (App. at 28a, n. 2; JA at 34-36). As the Court of Appeals pointed out, that letter was written to the United Paperworkers International Union, the "parent" union of the local union that instigated the instant lawsuit. (App. at 5a).

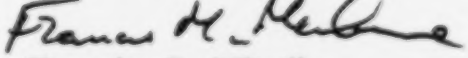
Notwithstanding the cautionary language of the Court of Appeals for the Third Circuit and the Department of Labor, and although this is a case of first impression, plaintiffs ask this Court to exercise its *certiorari* jurisdiction. They are undoubtedly aware that no other court has had an opportunity to address the issue in any factual context. It may well be that other courts will reach the same conclusion. Alternatively, courts may agree on issues of statutory interpretation, but reach different results depending upon varying factual contexts. At this juncture, therefore, the fact-specific ruling below is of interest principally to the parties, rather than the public. As this Court emphasized in *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923), "it is very important that [the Court] be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties. . . ."

CONCLUSION

Based on the specific facts of this case, the Court of Appeals correctly held that lump sum payments made to employees to induce the ratification of a collective bargaining agreement were not compensation for hours of employment, and that such payments were properly excluded from the regular rate of compensation in calculating overtime pay under the FLSA. In adopting that holding, the Court of Appeals relied on the District Court's Findings of Fact, the undisputed evidence in the record, the plain statutory language and the administrative interpretations of the pertinent statutory provisions.

This case of first impression is inappropriate for an exercise of *certiorari* jurisdiction. Not only was the decision of the Court of Appeals fundamentally sound, but it was based on the specific facts developed at trial. Plaintiffs' request for the adoption of a broad, *per se* rule is not only incorrect as a matter of law, but it is inconsistent with the admonitions of the Department of Labor that these cases must be decided individually, based on the specific factual contexts in which they are presented. Accordingly, for all of the above reasons, the Respondent employers respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief of Respondents in Opposition to Petition for Writ of Certiorari were served on counsel for Petitioners at the addresses below by United States mail, first-class postage prepaid on September 23, 1988, pursuant to Supreme Court Rule of Procedure 28.3:

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No. 88-346

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ANTHONY MINIZZA, *et al.*,
Petitioners,

v.

STONE CONTAINER CORP. CORRUGATED CONTAINER DIV. EAST PLANT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

The respondent employers in their brief in opposition agree with the major premise of our *certiorari* petition by recognizing that "[i]n view of the prevalence of lump sum payments in collective bargaining in recent years, the issue of FLSA treatment in calculating overtime pay is . . . an important one." Brief in Opposition ("Opp. Br.") at 15. Respondents' attempt to blunt that acknowledgment, however, by maintaining that the Court of Appeals' analysis was either correct or, at least, so fact-bound as not to merit the exercise of this Court's *certiorari* jurisdiction. That attempt fails.

1. Respondents first rewrite the Court of Appeals opinion and then argue that, as rewritten, that opinion does not conflict with the Fair Labor Standards Act ("FLSA") or with the Secretary of Labor's interpretations of the FLSA.

One of the two related Questions Presented by our *certiorari* petition is whether "the 'regular rate' of compensation for purposes of calculating overtime payments under the [FLSA] includes payments to employees as compensation for services rendered, where the amount of compensation does not depend upon the precise number of hours worked or services rendered."

For the reasons stated in the petition we submit that the answer to that Question is "Yes." As we point out (Pet. 10-13 & n. 6), the opposite conclusion would be squarely contrary to Department of Labor interpretative regulations, and would lead to exclusion from the "regular rate of pay" for the calculation of overtime of all manner of payments to employees not calibrated to the *number* of hours worked or the *amount* of services provided.

Respondents do not dispute any of this; they *agree* that under the statute, there need only be "*some nexus* between services and compensation paid," and they *agree* as well that "[t]hat does not mean that the hours must be quantifiable in direct relation to the payment." Br. in Opp. at 9.

What respondents maintain, however is, that "[t]he Court of Appeals did not base its decision on the absence of a calibration or formula." Br. in Opp. at 9. In this regard, however, respondents are simply wrong: Central to the Court of Appeals opinion was its explicit statement that the lump sum payments in question cannot be "compensation for . . . hours of employment" unless "the payments [are] . . . conditioned on a certain number of hours worked or an amount of services provided." Pet. App. 12a. We fail to see how the Court of Appeals state-

ment can be accorded any meaning other than the one we have ascribed to it, or how this statement can be read to be consistent with the rule for which respondents argue.

That respondents now in effect concede that the Court of Appeals erred on this critical issue is, of course, grounds for *granting*, not for denying, the petition. Absent such review, the parties to collective bargaining agreements, and other courts, will have to take into account what the Court of Appeals erroneously stated the law to be, not what respondents now state the law to be.[1]

2. As to whether the Court of Appeals opinion states rules of law of sufficient generality to merit this Court's attention, respondents again ignore what the Court of Appeals said, as opposed to what respondents wish that court had said.

The Court of Appeals held (see Pet. 18-19), that an employer's *motive* for agreeing to a certain provision regarding payments to employees, rather than the objective characteristics of those payments, is controlling in the characterization of the payments for FLSA purposes. In this regard the Court of Appeals made a legal, not a factual, error. Pet. 18-21. And that legally erroneous analysis is the one that will be applied in later cases, absent this Court's review. That the Court of Appeals' legal analysis may lead to different results on different factual records is entirely beside the point, where that legal analysis itself is fundamentally in error.

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[1] Respondents also insist that the lump sum payments in this case were in fact not "intended to be rewards for services rendered," and therefore were not "compensation for . . . hours of employment" under the correct legal standard. The District Court, however, expressly found otherwise (Pet. App. 29a), and, as noted, the Court of Appeals applied an erroneous legal standard in overruling this finding. Moreover, where, as here, a payment is made only to employees who have been *actively* employed for a specified time period, there is obviously "some nexus" between services and compensation paid.

3. Given the Court of Appeals contrary suggestion, and respondents argument to the same effect, we emphasize that it *is not* our position that FLSA § 7(e)(2) excludes only payments made for idle hours or as reimbursements. Compare Br. in Opp. at 11; Pet. App. 11a-12a. We fully recognize that there may be payments to employees outside of those two categories that are "not made as compensation for hours of employment" and therefore should not be included in the FLSA "regular rate."

Our point, rather, is that where a lump sum payment is regarded as "wages" by the parties and expressly conditioned upon a minimum number of months of active service, the payment necessarily *is* "compensation for hours of employment" within the meaning of the FLSA. It is therefore of no consequence that the Department of Labor also recognizes that there may be lump sum payments to employees which so lack any nexus to services performed as to be excluded from the "regular rate" under § 7(e)(2). Br. in Opp. at 11, relying on October 15, 1981, Opinion Letter.[2]

Thus, the salient point for present purposes is that there is *no* Department of Labor statutory interpretation holding that cash payments to employees premised upon amount of active service are not compensation for services rendered, or come under the § 7(e)(2) exclusion.[3] To the contrary, as we have seen, the Department's promulgated regulations stress that for § 7(e)(2) purposes, the nexus between employment and compensation need not be in the form of a direct relationship between

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[2] The lump sum payments discussed in the 1981 Opinion Letter had no durational service requirement whatever. Moreover, the Department made clear that it viewed the circumstances in that case as unique, and would take a different view if such lump sum payments became (as this form of payment has become) commonplace in collective bargaining agreements. R. 26, 82.

[3] It bears noting that this does *not* mean that all such compensation is part of the "regular rate", since other subdivisions of FLSA § 7(e) may exclude the compensation from the "regular rate."

hours worked and compensation received. Moreover, the opinion letter that directly gave rise to this case explicitly states that as the Department interprets the statute, "where an employee must be on the payroll in order to receive a *future* bonus payment, the payment would be regarded as remuneration for employment which would be included in the regular rate under the Act." R. 36 (emphasis supplied); the second bonus in this case had precisely such a requirement.

There is, in short, nothing in the Department of Labor's words or logic that bolsters either the Court of Appeals' legal analysis or the result reached by that court. Instead the Labor Department's views support both our general legal position and, insofar as the Department has addressed facts analogous to those here, the precise result for which we argue in this case.

CONCLUSION

For the reasons stated above and in our *certiorari* petition, that petition should be granted.

Respectfully submitted,

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